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In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 06-3140-cv

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, VETERANS FOR PEACE, PLAINTIFFS-APPELLEES

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF STATE, AND CENTRAL INTELLIGENCE AGENCY, DEFENDANTS-APPELLANTS

Argued: Nov. 20, 2006
Decided: Sept. 22, 2008

Before: MCLAUGHLIN, HALL, *Circuit Judges*, and GLEESON, *District Judge*.[1]

JOHN GLEESON, *United States District Judge*:

The United States Department of Defense and Department of the Army (referred to here as "the defendants") appeal from orders of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, *District Judge*) directing them to release 21 photographs pursuant to the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552 (2006). The photographs depict abusive treatment of detainees by United States soldiers in Iraq and Afghanistan.

On appeal, the defendants contend that the exemption in § 552(b)(7)(F) for law enforcement records that could reasonably be expected to endanger "any individual" applies here because the release of the disputed photographs will endanger United States troops, other Coalition forces, and civilians in Iraq and Afghanistan. They further claim that, notwithstanding the redactions ordered by the district court of 20 of the 21 photographs, disclosure will result in unwarranted invasions of the personal privacy of the detainees they depict, justifying nondisclosure under § 552(b)(6) and (7)(C).

We hold that FOIA exemption 7(F) does not apply to this case. We further hold that the redactions ordered by the district court render the privacy exemptions unavailable to the defendants. Accordingly, we affirm.

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[1] The Honorable John Gleeson of the United States District Court for the Eastern District of New York, sitting by designation.

BACKGROUND

On October 7, 2003, the plaintiffs filed joint requests with the defendants and various other agencies pursuant to FOIA, 5 U.S.C. § 552 (2006), seeking records related to the treatment and death of prisoners held in United States custody abroad after September 11, 2001, and records related to the practice of "rendering" those prisoners to countries known to use torture. On June 2, 2004, having received no records in response to the requests, the plaintiffs filed the complaint in this case, alleging that the agencies had failed to comply with the law.

On August 16, 2004, to facilitate the search for relevant records, the plaintiffs provided a list of records they claimed were responsive to the FOIA requests. Among the records listed were 87 photographs and other images of detainees at detention facilities in Iraq and Afghanistan, including Abu Ghraib prison. The images from Abu Ghraib (the "Abu Ghraib photos") depicted United States soldiers engaging in abuse of many detainees. The soldiers forced detainees, often unclothed, to pose in dehumanizing, sexually suggestive ways.

The defendants initially invoked only FOIA exemptions 6 and 7(C) as their ground for withholding the Abu Ghraib photos. Those provisions authorize withholding where disclosure would constitute an "unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6), (7)(C). The defendants contended in their motion for summary judgment that these personal privacy exemptions warranted the withholding of the Abu Ghraib photos in order to protect the privacy interests of the detainees depicted in them. The plaintiffs argued in their cross-mo-

tion that redactions could eliminate any unwarranted invasions of privacy.

More than two months after oral argument of the cross-motions, the defendants added another justification for withholding the Abu Ghraib photos: exemption 7(F). That exemption authorizes withholding of records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to endanger the life or physical safety of any individual." § 552(b)(7)(F). According to the defendants, release of the Abu Ghraib photos could reasonably be expected to endanger the life or physical safety of United States troops, other Coalition forces, and civilians in Iraq and Afghanistan.

On September 29, 2005 the district court rejected the defendants' arguments and ordered the disclosure of the Abu Ghraib photos. *See ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 579 (S.D.N.Y. 2005) (the "Abu Ghraib order"). It determined that redaction of "all identifying characteristics of the persons in the photographs" would prevent an invasion of privacy interests. *Id.* at 571. To the extent that an invasion of privacy might occur in spite of the redactions, the court found that such an invasion would not be "unwarranted" since the public interest involved "far outweighs any speculative invasion of personal privacy." *Id.* at 572-73.

The district court also rejected the defendants' eleventh-hour "supplemental" argument related to exemption 7(F). Without deciding whether the exemption's protection of "any individual" extended as far as the defendants claimed, the court concluded that in any event, "the core values that Exemption 7(F) was designed to protect are not implicated by the release of the [Abu Ghraib] photographs, but . . . the core values of

FOIA are very much implicated." *Id.* at 578. The district court stated, "Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command." *Id.* at 575. While acknowledging the "risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts," the court balanced that risk against the benefits of "education and debate that such publicity will foster," and ordered the photos released in redacted form. *Id.* at 578.

The defendants appealed the Abu Ghraib order, but in March 2006, while the appeal was pending, many of the Abu Ghraib photos were published on the internet by a third party. The appeal was thereafter withdrawn.

After the appeal was withdrawn, the plaintiffs sought clarification regarding other detainee abuse images, and the defendants confirmed that they were withholding an additional 29 images, again based on exemptions 6, 7(C) and 7(F). Whereas the Abu Ghraib photos were taken at that one location, the 29 photographs were taken in at least seven different locations in Afghanistan and Iraq, and involved a greater number of detainees and U.S. military personnel. And while many of the Abu Ghraib photos depicted unclothed detainees forced to pose in degrading and sexually explicit ways, the detainees in the 29 photographs were clothed and generally not forced to pose. The photographs were part of seven investigative files of the Army's Criminal Investigations Command ("Army CID"), and were provided to Army CID in connection with allegations of mistreatment of detainees. In three of the investigations, Army CID found probable cause to believe detainee abuse had oc-

curred related to the photographs at issue here. Soldiers under scrutiny in two of the investigations have been punished under the Uniform Code of Military Justice.

On April 10, 2006, the district court established an expedited procedure for determining whether the 29 images could properly be withheld.[2] By orders dated June 9, 2006 and June 21, 2006, the district court ordered the release of 21 of the disputed photos, all but one in redacted form. The 21 photographs were from six of the seven Army CID investigative files; the district court found that the photographs from one of the files showed no suggestion of abuse and thus need not be produced. Since the defendants' basis for withholding the 29 photographs had been the same as their basis for withholding the Abu Ghraib photos, the district court adopted the reasoning of the Abu Ghraib order.

The defendants' appeal of the June 2006 orders is now before us. There is no cross-appeal, and thus neither the order permitting the withholding of eight photographs nor the order directing redactions of the photographs to be disclosed is before us. We refer here to the 21 photographs in dispute as the "Army photos."

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[2] In a letter dated June 29, 2006, the defendants informed the plaintiffs that they were withholding an additional 23 images of detainees based upon FOIA exemptions 6, 7(C), and 7(F), and that they would consider the release of those photographs to be governed by the final ruling in this case.

DISCUSSION

A. *Governing Legal Standards*

The Freedom of Information Act requires that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . , shall make the records promptly available to any person," 5 U.S.C. § 552(a)(3)(A), unless the records fall within one of the Act's nine exemptions, § 552(b)(1)-(9). The Act is broadly conceived to reflect "a general philosophy of full agency disclosure," and its exemptions are exclusive, *FLRA v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992), and "must be narrowly construed," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (internal quotation omitted)); *see also Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355-56 (2d Cir. 2005) ("Consistent with FOIA's purposes, these statutory exemptions are narrowly construed." (citing cases)).

FOIA's purpose is to encourage public disclosure of information in the possession of federal agencies so that the people may "know what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1988) (internal quotation and emphasis omitted). "Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Id.* at 773. The release of information of this sort vindicates FOIA's basic purpose: "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors

accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (describing FOIA as "a structural necessity in a real democracy").

A district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." § 552(a)(4)(B). As FOIA applies government-wide and no one agency administers it, no agency is entitled to deference in interpreting its provisions. *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) (citing cases). Further, FOIA expressly provides for de novo review of agency decisions to withhold records and places the burden of persuasion on the agency. *Reporters Comm.*, 489 U.S. at 755; *see also* § 552(a)(4)(B) ("[T]he court shall determine the matter de novo . . . and the burden is on the agency to sustain its action."). Doubts, therefore, are to be resolved in favor of disclosure. *FLRA*, 958 F.2d at 508; *accord, e.g., Local 3. Int'l Bhd. of Elec. Workers* v. *NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988).

As mentioned above, the district court's review of the defendants' invocation of FOIA's exemptions was de novo. Our review of the district court's decisions, which were made on cross-motions for summary judgment, is de novo as well. *See, e.g., Wood v. FBI*, 432 F.3d 78, 82 (2d Cir. 2005) ("This Court reviews *de novo* a district court's grant of summary judgment in a FOIA case.").

B. *FOIA Exemption 7(F)*

The argument defendants raised as an afterthought below is their lead argument on this appeal. They contend that FOIA exemption 7(F), 5 U.S.C. § 552(b)(7)(F)

(2006), justifies withholding the Army photos and that the district court erred in concluding otherwise. Exemption 7(F) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." *Id.* In relying on this exemption, the defendants contend that (a) the Army photos, which were gathered during Army CID investigations, are documents "compiled for law enforcement purposes" within the meaning of the statute; (b) disclosure of the photos could reasonably be expected to incite violence against United States troops, other Coalition forces, and civilians in Iraq and Afghanistan; and (c) since there is no limit to who is protected by exemption 7(F), withholding is warranted.

The first contention is undisputed. The second and third are disputed, but neither was actually decided by the district court. Without deciding whether the defendants had satisfied their burden of showing that the Army photos "could reasonably be expected to" result in acts of violence by insurgents, the district court acknowledged "a risk" of such violence. 389 F. Supp. 2d at 578. It then balanced that risk against the "core values" of FOIA and the benefits of disclosure, concluding that disclosure was warranted. The district court explicitly declined to resolve the parties' dispute regarding the proper construction of the phase "any individual" in exemption 7(F). *Id.*

We resolve the latter dispute here, and our resolution disposes of the exemption 7(F) issue.[3] The defendants argue that the plain meaning of the term "any individual" is unlimited, and thus includes individuals identified solely as military and civilian personnel in Iraq and Afghanistan. Exemption 7(F), the defendants assert, "does not limit its protection to some individuals at the exclusion of others." (Appellants' Br. 29-30.) Rather, the argument continues, "'any' means 'any,'" and there is neither need nor authority to look beyond the plain language of the exemption to determine its breadth.

We disagree. The phrase "any individual" in exemption 7(F) may be flexible, but is not vacuous. Considering, as we must, the words in the statute, the structure of FOIA and its exemption provisions, the chronology of amendments to those provisions, and the requirement that FOIA exemptions be narrowly construed, we cannot read the phrase to include individuals identified solely as members of a group so large that risks which are clearly speculative for any particular individuals become reasonably foreseeable for the group.

1. *The Phrase "Any Individual"*

Exemption 7(F) justifies withholding any law enforcement records that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Do the defendants satisfy their burden of establishing the exemption's applicability if

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[3] We therefore assume for the purposes of this appeal, but need not decide, that the photographs could reasonably be expected to incite violence against United States troops, other Coalition forces, and civilians in Iraq and Afghanistan.

they do not point to any one individual and establish that he or she could reasonably be expected to be endangered, but instead point to a group composed of millions of people and establish that it could reasonably be expected that someone in that group will be endangered?

The plain language of the phrase "endanger the life or physical safety of any individual" connotes a degree of specificity above and beyond that conveyed by alternative phrases such as "endanger life or physical safety." It is true that the statute does not read "any *named* individual," and we thus understand it to include individuals identified in some way other than by name—such as, for example, being identified as family members or coworkers of a named individual, or some similarly small and specific group. This does not, however, mean that the "individual" contemplated by exemption 7(F) need not be identified at all, or may be identified only as a member of a vast population. To the contrary, the legislature's choice to condition the exemption's availability on danger to an *individual*, rather than danger in general, indicates a requirement that the subject of the danger be identified with at least reasonable specificity.

The defendants emphasize that Congress used the word "any" to modify "individual," and contend that the broad scope of the word "any" relieves them of the burden of identifying, even roughly, an individual. We are mindful that the Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). But at least one thing is clear from the Court's decisions interpreting the meaning of the word "any" in federal statutes: "Any" does *not* always

deserve the expansive application the defendants urge here. Rather, a court must construe the term carefully, in light of the statute as a whole as interpreted by accepted principles of construction, and, where applicable, the statutory framework that preceded its enactment.

In *Small v. United States,* for example, the Court examined 18 U.S.C. 922(g)(1), which makes it illegal for a person who has been convicted of a felony "in any court" to possess a firearm. 544 U.S. 385, 387 (2005). In considering whether a felony conviction in a foreign court brings a gun-toting defendant within the ambit of the law, the Court did not begin (and thereby end) its analysis with a simplistic "'any' means 'any.'" To the contrary, it began by observing that "[t]he word 'any' considered alone cannot answer this question." *Id.* at 388. Although it "demands a broad interpretation, we must look beyond that word itself." *Id.* (citation omitted). "In ordinary life, a speaker who says, 'I'll see any film,' may or may not mean to include films shown in another city. In law, a legislature that uses the statutory phrase 'any person' may or may not mean to include 'persons' outside the jurisdiction of the state." *Id.* (internal quotation omitted). Since the other language in the statute did not suggest an intent to reach foreign convictions, there was no legislative history suggesting such an intent, and the presumption against extraterritorial application of statutes instructed courts to decline to find such intent in analogous cases, *id.* at 388-89, the Supreme Court held that "any court" did not mean "any court," but rather "any *domestic* court," and foreign convictions could therefore not serve as a predicate to liability under the statute. *Id.* at 391-93.

The Supreme Court has rejected a broad interpretation of the word "any" in other contexts as well where such interpretation is inconsistent with the statutory context and legislative purpose. The Age Discrimination in Employment Act ("ADEA") forbids an employer's discrimination against "any individual" over 40 years of age "because of such individual's age." 29 U.S.C. § 623 (2006). In *Gen. Dynamics Land Sys., Inc. v. Cline*, the question was whether a health benefit policy favoring only workers at least 50 years of age violated the ADEA rights of the employees who were over 40 but not yet 50. 540 U.S. 581, 584-85 (2004). In other words, did the ADEA's protection of "any individual" over 40 from age discrimination protect the younger group of over-40 workers from discrimination that favored the older group? Espousing the "'any' means 'any'" argument advanced by the defendants here, the Sixth Circuit held that it did. *See Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 470 (6th Cir. 2002) ("[T]he ADEA requires us to hold . . . that employment age discrimination against *any* worker at least 40 years of age is prohibited. . . . " (emphasis in original)). But the Supreme Court reversed, determining that the Sixth Circuit's construction did not "square with the natural reading of the whole provision preventing discrimination." 540 U.S. at 586. The Court held that only individuals subjected to discrimination that prefers the young to the old have a cause of action under the ADEA. *Id.* at 600; *see also Nixon v. Mo. Mun. League*, 541 U.S. 125, 128-32 (2004) (construing statute's reference to "any entity" providing telecommunications services not to include a state's own subdivisions; "'[A]ny' can and does mean different things depending upon the setting."); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631

(1818) (Marshall, C.J.) (observing that "[t]he words 'any person or persons,' are broad enough to comprehend every human being," but holding that "general words" must be limited "to those objects to which the legislature intended to apply them.").

To be sure, sometimes the word "any" in a statute deserves an expansive application. However, consistent with the cases discussed above, the Supreme Court has made it clear that such a result must never be the result of a wooden, uncritical capitulation to the word itself. Rather, it occurs where the surrounding statutory language and other relevant legislative context support it. In *United States v. Gonzales*, 520 U.S. 1, 11 (1997), for example, the Court held that the requirement in 18 U.S.C. § 924(c)(l) that sentences imposed under the statute be consecutive to "any other term of imprisonment" could not properly be limited to *federal* terms of imprisonment. But it did so only after determining that "other language in [the statute] reinforces our conclusion." *Gonzales*, 520 U.S. at 10. Finding "no intimation" in the statute as a whole that Congress meant otherwise, and taking into account the fact that the statute was amended in 1984 to repudiate judicial constructions that narrowed its scope, the Court adopted an expansive interpretation of "any other term of imprisonment." *Id.* at 9-10.

Thus, the defendants' argument that "any individual" in exemption 7(F) must, due solely to the brute force of the word "any," be interpreted to extend its protection to all persons, whether or not they can be identified, no matter how remote they are from the law enforcement investigation in which the disputed records were compiled, and no matter how small the risk to any particular

individual, is incorrect. We must examine not only the word "any" but also the language of the remainder of the provision, the structure of FOIA's exemptions, and the context and history leading to its adoption.

We begin with the specific context in which the disputed language is used. It bears emphasis that we construe the Freedom of Information Act. "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature." *Palmer*, 16 U.S. (3 Wheat.) at 631. The law was enacted to make agency records available to the public "except as *specifically* stated" in one of the enumerated exemptions. § 552(d) (emphasis added). As mentioned above, though important interests are served by those exemptions, the Supreme Court has repeatedly cautioned that they "are to be narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *accord U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Rose*, 425 U.S. at 361.

This rule of construction is of central importance here. The defendants' construction of "any individual" as not requiring the government to name or even roughly identify any individual, besides gesturing to the populations of two nations and two international expeditionary forces and showing that it could reasonably be expected that at least one person within them will be endangered, is not a narrow one. The reading of "any individual" as requiring a FOIA defendant to identify an individual with reasonable specificity is a narrower construction, and to be preferred on that ground alone. In *Small*, an analogy to the presumption against extraterritorial application of statutes led the Court to construe "any court" not to include foreign courts. 544 U.S. at 388-89. In *General Dynamics*, the ADEA's statement of

purpose and findings counseled against a broad construction of the statute's anti-discrimination provision. 540 U.S. at 590-91. Similarly, here the principle that FOIA exemptions are to be construed narrowly cabins the permissible construction of the phrase "any individual." A construction that requires the agency to identify with reasonable specificity the person or persons who could reasonably be expected to be endangered accords with that principle. The defendants' unbounded interpretation does not.

That interpretation is also inconsistent with the remainder of the text of the statute. To construe the word "any" to relieve the government of the burden of identifying an individual who could reasonably be expected to be endangered would be to read "individual" out of the exemption. In effect, it would convert the phrase "endanger the life or physical safety of any individual" into "endanger life or physical safety." Indeed, it is telling that one of the cases the defendants cite misquotes exemption 7(F) in just this way, leading it to conclude that diffuse harms to unknown and unspecified individuals are covered by the exemption. *See Brady-Lunny v. Massey*, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) ("Under 5 U.S.C. § 552(b)(7)(F), the Government is exempt from disclosing information about any individual that 'could reasonably be expected to endanger life or physical safety.'"). As we construe statutes to avoid surplusage, *see Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 152 (2d Cir. 2006) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant[.]" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))), we cannot ignore the role that the word "individual" plays in exemption 7(F).

While all harms in the end are suffered by individuals, there is a crucial difference between a showing that disclosure "could reasonably be expected to endanger life or physical safety" and exemption 7(F)'s requirement that disclosure "could reasonably be expected to endanger the life or physical safety of any individual." With large enough populations, remote and speculative risks become radically more likely to manifest in at least one person. No one person can reasonably be expected to die in a car accident, but it is certain that someone somewhere in the world will die in a car accident every day. *See* World Health Org., World Report on Road Traffic Injury Prevention 4 (2004), *available at* http://www.who.org/violence_injury_prevention/publications/road_traffic/world_report/en/index.html (estimating annual global death toll due to motor vehicle accidents as between 750,000 and 1,183,492). Reading the word "individual" out of exemption 7(F) allows consideration of such diffuse and speculative risks. If exemption 7(F) covered information whose disclosure "could reasonably [be] expected to endanger life or physical safety," it might be proper to aggregate individually speculative risks and find that it is reasonably likely that life or physical safety will be endangered somewhere in the world. But exemption 7(F), by conditioning its application on a reasonable expectation of danger *to an individual*, excludes from consideration risks that are speculative with respect to any individual.[4]

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[4] We draw support from the fact that Congress elsewhere in the Code distinguishes between assessing a threat to a reasonably identifiable person and assessing a generalized threat to a broader group. The Bail Reform Act asks courts to determine whether a person's release from pretrial detention "will endanger the safety of any other person *or the community*." 18 U.S.C. § 3142(b) (2006) (emphasis add-

This case shows the significance of Congress's decision to require a showing of danger to an individual. With good reason, the defendants do not identify a single person and say that the release of the Army photos could reasonably be expected to endanger that person's life or physical safety; the threat to any one person is far too speculative. What the defendants argue, and what we assume for the purposes of this opinion, is the far different proposition that it could reasonably be expected that out of a population the size of two nations and two international expeditionary forces combined, someone somewhere will be endangered as a result of the release of the Army photos. Thus, we do not consider a case where the defendants have shown exemption 7(F)'s required reasonable expectation of endangerment with respect to one or more individuals, but one where the defendants attempt to cobble together that required reasonable expectation of endangerment by aggregating miniscule and speculative individual risks over a vast group of individuals.

We hold that in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual. We need not shape the precise contours of the exemption today, as it is not a close question whether the government has identified any relevant individual with reasonable speci-

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ed). The reference to the safety of "the community" would be superfluous if such generalized risks could be captured by assessing threats to the safety of "any" person other than the releasee. This authorization to consider risks to the broader "community," considered necessary by Congress in the Bail Reform Act, is conspicuously absent from exemption 7(F).

ficity. It is plainly insufficient to claim that releasing documents could reasonably be expected to endanger some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan. The structure of FOIA and the applicable legislative history, both of which contemplate a far narrower role for exemption 7(F) than that envisioned by the defendants, amply confirm our holding.

2. *The Structure of FOIA and its Exemptions*

Our conclusion as to the breadth of exemption 7(F) is supported by the structure of FOIA's exemptions. The context of the exemption severely undercuts the defendants' claim that Congress tucked such a far-reaching and nebulous authority for withholding into one of the several discrete law enforcement exemptions. "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Such clarification occurs when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* Here the defendants' reading of exemption 7(F) is inconsistent with FOIA's treatment of national security information.

To say that exemption 7(F) does not contemplate withholding records on the basis of diffuse threats of death or physical injury, threats which are individually speculative but which can reasonably be expected with respect to large populations, is not to denigrate such threats, which of course are characteristic of the na-

tional security sphere. Indeed, the defendants acknowledge the disclosure issue currently before us as a matter of national security. (*See, e.g.*, Appellants' Br. 25 (seeking substantial deference by the Court to the "predictive judgments on issues of national security" of Brigadier General Carter F. Ham and General Richard B. Myers).) FOIA, however, provides a separate exemption specifically tailored to the national security context, which is a powerful reason not to construe exemption 7(F) as broadly as the defendants urge.

FOIA's exemption 1, 5 U.S.C. § 552(b)(1), exempts from disclosure records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."[5] Executive Order 13,292 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information." Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). It also sets forth limits on what may be classified, by what authority, and for how long. First among the limits are prohibitions against classifying information in order to "conceal violations of law, ineffi-

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[5] FOIA's exemption 3, justifying withholding pursuant to other specific statutory authorization, § 552(b)(3), has also been applied to protect certain classes of national security information, see *CIA v. Sims*, 471 U.S. 159, 167-68 (1985) (holding CIA's organic statute qualifies as statutory authorization for withholding records of "intelligence sources and methods" under exemption 3). If anything, this demonstrates that Congress has given due attention to the unique issues relating to national security and further undermines the defendants' suggestion that exemption 7(F) must be read to overlap the statutory scheme protecting national security information.

ciency, or administrative error" or "prevent embarrassment to a person, organization, or agency." *Id.* § 1.7(a).

Although Executive Order 13,292 is not a law, FOIA incorporates its safeguards into exemption 1. § 552(b)(1)(B). Indeed, earlier versions of these prohibitions were included in Executive Order 11,652 (a precursor to Executive Order 13,292) when Congress initially incorporated such safeguards into exemption 1 in 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974). *See* Exec. Order No. 11,652, § 4, 37 Fed. Reg. 5209 (Mar. 8, 1972) ("In no case shall information be classified in order to conceal inefficiency or administrative error, [or] to prevent embarrassment to a person or Department . . . .").[6] Not only were similar such safeguards thus contemplated by Congress's 1974 amendment of exemption 1, but the current safeguards were also in force at the time of the 1986 amendments to FOIA. *See* Exec. Order No. 12,356, § 1.6(a), 47 Fed. Reg. 14,874 (1982) ("In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; [or] to prevent embarrassment to a person, organization, or agency . . . ."). While the President could theoretically modify the executive branch's classification standards to abrogate these safeguards, substantially the same safeguards have been in force, and incorporated into FOIA through exemption 1, from 1974 to the present. They are therefore properly considered part of the statutory backdrop against which Congress legislated in 1986 when it changed exemption 7(F) to protect information that "could reasonably be expected to endanger the life or physical safety of any individual." Pub. L. No. 99-570,

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[6] For more discussion of Congress's 1974 amendments to exemption 1, see Section B.3, *infra*.

§ 1802(a), 100 Stat. 3207 (1986); *see also John Doe Agency*, 493 U.S. at 162 (Scalia, J., dissenting) ("Congress has greatly reduced the possibility of abuse [of exemption 1] by providing that the classification must *be proper under criteria established by Executive order.*" (emphasis in original)).

The existence of separate standards for information threatening harm to national security severely undercuts the defendants' asserted construction of exemption 7(F). It would be anomalous if an agency that could not meet the requirements for classification of national security material could, by characterizing the material as having been compiled for law enforcement purposes, evade the strictures and safeguards of classification and find shelter in exemption 7(F) simply by asserting that disclosure could reasonably be expected to endanger someone unidentified somewhere in the world.[7] The defendants' standard is far more favorable to secrecy than even the lowest tier of the current classification system. *See* Exec. Order No. 13,292, § 1.2(a)(3) (defining lowest level of classified information as "Confidential," and authorizing that designation for "information, the unauthorized disclosure of which reasonably could be expected to cause *damage to the national security* that the original classification authority is able to identify and describe." (emphasis added)). The defendants invite us to convert exemption 7(F) into, in effect, an alternative

[7] The defendants have not explained whether the Army photos may be properly classified, and thereby rendered exempt from disclosure, or why that has not occurred. Their failure to invoke exemption 1 would not foreclose their resort to exemption 7(F) if it applied, but the existence of the separate national security exemption undercuts their argument that exemption 7(F) encompasses information solely because of the national security harm it threatens.

classification mechanism entirely lacking the executive's safeguards and standards. The threats that would justify keeping such information secret are no less diffuse and speculative than those involved in the sphere of national security, but are significantly less grave. Such an alternative classification system is inconsistent with the structure of FOIA's exemptions.

The limitation of exemption 7(F) to law enforcement records does not diminish that inconsistency. First, the ease with which the government can find refuge for its records on the ground that they were compiled for "law enforcement purposes" can hardly be overstated. *See John Doe Agency*, 493 U.S. at 162-64 (Scalia, J., dissenting) (describing the ability to transfer records to an investigation file as "a hole one can drive a truck through"). Second, assuming the utmost good faith of the government, the disparate treatment that would be accorded law enforcement national security information and non-law-enforcement national security information confirms that exemption 7(F) will not bear the weight the defendants place upon it. Information generated from national security operations unconnected to law enforcement would be inexplicably subject to higher judicial scrutiny, through exemption 1, than information generated from national security operations performed by means of law enforcement. It is inconsistent with other provisions of the United States Code to construe law enforcement national security operations to be subject to less judicial oversight—regarding the secrecy of their records or anything else—than non-law-enforcement national security operations. *Compare, e.g.*, 18 U.S.C. § 2518(5) (2006) (authorizing law enforcement electronic surveillance only for 30 days before seeking a judicial extension of time, and permitting only one 30-

day extension) *with* 50 U.S.C. § 1805(e) (2006) (authorizing various types of national security electronic surveillance for 90-day, 120-day, and 1-year periods and permitting multiple extensions of time).

Thus, the structure of FOIA's exemption provision, with its separate exemptions and different standards for national security matters and for law enforcement matters, counsels in favor of the narrower construction of 7(F) that we adopt here.

3. *The Legislative History of Exemption 7(F)*

An examination of the legislative history and background surrounding the adoption of the current form of exemption 7(F) confirms that the exemption simply does not function as a far broader alternative to the national security classification system. Congress has always envisioned exemption 7(F) as a shield against specific threats to particular individuals arising out of law enforcement investigations, never as a means of suppressing worldwide political violence.

FOIA was enacted as an antidote to the perceived "loopholes" in Section 3 of the Administrative Procedure Act ("APA"), which allowed agencies "to deny legitimate information to the public." S. Rep. No. 89-813 (1965), *reprinted in* Subcomm. on Admin. Practice & Procedure, S. Comm. on the Judiciary, 93rd Cong., *Freedom of Information Act Source Book* 36, 38 (Comm. Print 1974) [hereinafter *FOIA Source Book*]. Section 3, the APA's disclosure statute, allowed agencies to withhold information "requiring secrecy in the public interest" or "for good cause." APA § 3, Pub. L. No. 79-404, 60 Stat. 237, 238 (1946), *reprinted in FOIA Source Book*, *supra*, at 39-40. Congress feared that this open-ended lan-

guage may have allowed agencies to withhold information "only to cover up embarrassing mistakes or irregularities." S. Rep. No. 89-813, *reprinted in FOIA Source Book, supra,* at 38; *see also* H.R. Rep. No. 89-1497 (1966), *reprinted in FOIA Source Book, supra,* at 22, 33 ("[T]he law which was designed to provide public information about Government activities has become the Government's major shield of secrecy.").

In stating the purpose of FOIA, which was passed as an amendment to Section 3 of the APA, the Senate Judiciary Committee stated:

> It is the purpose of the present bill to . . . establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongly withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.

S. Rep. No. 89-813, *reprinted in FOIA Source Book, supra,* at 38; *see also* H.R. Rep. No. 89-1497, *reprinted in FOIA Source Book, supra,* at 33 ("A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating.").

Congress recognized, however, that certain information should not be disclosed to the public, so it set forth

nine exemptions to FOIA.[8] Originally, exemption 7 allowed the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1967). The exemption precluded private parties engaged in litigation with the government from

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[8] When FOIA was first enacted and modified by a minor stylistic amendment, the nine exemptions were articulated as follows:

> The provisions of this section shall not be applicable to matters that are
>
> (1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute;
>
> (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and
>
> (9) geological and geophysical information and data (including maps) concerning wells.

5 U.S.C. § 552(b) (1967).

obtaining more via FOIA than they were entitled to receive under the relevant disclosure rules. *See* H.R. Rep. No. 89-1497, *reprinted in FOIA Source Book, supra*, at 32 (explaining that exemption 7 was necessary because FOIA "is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."); *see also Robbins*, 437 U.S. at 224 ("Foremost among the purposes of [exemption 7] was to prevent harm to the Government's case in court." (internal quotation omitted)).

FOIA got off to a slow start. A series of oversight hearings conducted in 1971 and 1972 by a subcommittee of the House Committee on Government Operations identified several major problem areas in the administration of the statute. They included bureaucratic delays in response time, fee schedule abuses, over-involvement of political appointees in the decision-making process and a poor attitude among top administration officials toward the "open access" spirit of FOIA. H.R. Rep. No. 92-1419, at 8 (1972), *reprinted in* Subcomm. on Gov. Info. & Individual Rights, H. Comm. on Gov. Operations, 94th Cong. & Subcomm. on Admin. Practice & Procedure, S. Comm. on the Judiciary, 94th Cong., *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book* 8, 15 (Comm. Print 1975) [hereinafter *1974 Amendment Source Book*]. As a result, the committee concluded that "[i]n too many cases, information is withheld, overclassified, or otherwise hidden from the public to avoid administrative mistakes, waste of funds, or political embarrassment." *Id.*, *reprinted in 1974 Amendment Source Book, supra*, at 15.

Additional oversight hearings in 1973 before subcommittees of the Senate Committee on the Judiciary produced similar findings, and the committee concluded that "the primary obstacles to the Act's faithful implementation by the executive branch have been procedural rather than substantive." *See* S. Rep. No. 93-854 (1974), *reprinted in 1974 Amendment Source Book, supra*, at 153. The resulting amendments, enacted over the veto of President Ford, tightened and clarified some of FOIA's key procedural requirements. Among the changes were required indices reflecting agency action, standardized search and copy fees for FOIA plaintiffs, time frames for agency action, allowance for recovery of reasonable attorney fees and costs by FOIA plaintiffs, required annual reporting on the administration of FOIA, and an expanded definition of what constitutes an "agency." *See id.* at 160-87.

The 1974 amendments also altered the exemptions in several significant respects.[9] First, as noted above, they

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[9] As amended in 1974, Section 552(b) provided as follows:

This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

incorporated the executive branch's classification standards by providing that any information withheld pursuant to exemption 1 in the interest of national defense had to be "in fact properly classified pursuant to" executive order. § 552(b)(1)(B). That amendment reversed the effect of the Supreme Court's holding in *EPA v. Mink*, 410 U.S. 73, 84 (1973), that FOIA's grant of judicial review did not empower courts to review executive classification decisions by conducting in camera review of the documents at issue. The amended exemption 1 authorized courts to initiate, where appropriate, such in

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(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

5 U.S.C. § 552(b) (1974); *see also* Pub. L. No. 93-502, § 2, 88 Stat. 1561, 1563-64 (1974) (amending FOIA exemptions).

camera examinations of contested records to determine whether they had been properly classified. 5 U.S.C. § 552(a)(4)(B) (1974); *see also* H.R. Rep. No. 93-1380 (1974) (Conf. Rep.), *reprinted in 1974 Amendment Source Book, supra,* at 219, 229 (describing intent to override *Mink* and allow in camera examination).

Second, the 1974 amendments responded to concerns that the opportunity to exempt law enforcement "files" created an incentive among agencies "to commingle various information into one enormous investigatory file and then claim it is too difficult to sift through" to determine whether any of its contents are responsive to a valid FOIA request. 120 Cong. Rec. S19,806-23 (daily ed. Nov. 21, 1974) (Statement of Sen. Hart), *reprinted in 1974 Amendment Source Book, supra,* at 451 ("This 'contamination technique' has been widely used by agencies to thwart access to publicly valuable information in their files."). So Congress replaced the word "files" in exemption 7 with the word "records," and ordered agencies to examine individual records containing exempt information and to disclose "any reasonably segregable portion" of those records upon request. § 552(b) (1974); *see Robbins,* 437 U.S. at 229-30 (noting that substituting the word "records" for "files" helped avoid "impermissible 'commingling' by an agency's placing in an investigatory file material that did not legitimately have to be kept confidential").

Finally, the 1974 amendments replaced the broad language of exemption 7, which had covered all investigatory files except to the extent they were already made available by law, with six specific subprovisions. The amended exemption required agencies to demonstrate that each withheld investigatory record fit into one of

the six subprovisions. Most significantly for the purposes of this case, the subprovisions authorized the withholding of records that would (1) disclose the identity of a confidential source (or, with respect to criminal law enforcement or national security records, disclose confidential information provided solely by such a source), § 552(b)(7)(D) (1974); or (2) endanger the life or physical safety of "law enforcement personnel," § 552(b)(7)(F) (1974).

The 1974 amendments were intended to reinvigorate FOIA. By eliminating the ability of an agency to place entire law enforcement files out of the public's reach, and then narrowing the withholding authority to the six specified categories of records, they accomplished that goal. But in doing so, the amendments created some problems. Records identifying a confidential source could be withheld, as could records that would endanger law enforcement personnel. But what about records that could endanger the families of such persons, or persons assisting law enforcement who are neither confidential sources nor government employees? Attorney General Edward H. Levi identified these problems in a 1975 memorandum regarding the amendments to the executive branch departments and agencies. The memorandum set forth guidelines for the implementation of the amended FOIA, and stated as follows with respect to exemption 7(F):

> Clause (F), which was added by the Conference Committee, exempts material whose disclosure would "endanger the life or physical safety of law enforcement personnel."
>
> . . .

> Clause (F) might apply, for example, to information which would reveal the identity of undercover agents, State or Federal, working on such matters as narcotics, organized crime, terrorism, or espionage. *It is unclear whether the phrase "law enforcement personnel" means that the endangered individual must be technically an "employee" of a law enforcement organization; arguably it does not. It is clear, however, that the language of clause (F) cannot be stretched to protect the safety of the families of law enforcement personnel or the safety of other persons.*

Edward H. Levi, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* pt. I-B (1975), *available at* http://www.usdoj.gov/oip/74agmemo.htm.

Those words proved to be prophetic. As the war on drugs and organized crime escalated in the early 1980s, those areas of law enforcement activity "constitute[d] a special problem under FOIA." 132 Cong. Rec. S14,040 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch), and the fact that exemption 7(F)'s protections were limited to "law enforcement personnel" was central to this special problem. As the Deputy Attorney General stated in support of proposed amendments:

> The current language in Exemption 7(F) exempts records only if their disclosure would endanger the life of a law enforcement officer. However, the exemption does not give similar protection to the life of any other person. S. 774 expands Exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process.

131 Cong. Rec. S253 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General).[10] In response, Congress again amended FOIA in connection with passage of the Anti-Drug Abuse Act of 1986. Senator Hatch, who authored the changes with Senator Leahy, noted during Congressional debate that "no fewer than five different reports studying the impact of FOIA have concluded that the act has harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations." 132 Cong. Rec. S14,038 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch). Instead of being used by members of the public to learn of official conduct, FOIA was being "used by lawbreakers to evade criminal investigation or retaliate against informants." *Id.* (internal quotation omitted). Indeed, a 1982 Drug Enforcement Agency study that found 60% of FOIA and Privacy Act requests "originated within the criminal element." *Id.* Thus, the bill's proponents argued that "the language in 7(F) has an obvious and absurd limitation. Under this language, records are only exempt if they endanger the life of a police officer, without giving similar protection to the life of any natural person." *Id.* at S14,039.

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[10] S. 774 was passed by the Senate, but it was not acted on by the House during the 98th Congress. However, § 10 of the bill supplied the language for the 1986 amendments to exemption 7, and the Senate Judiciary Committee's report on § 10 of S. 774 was explicitly adopted by both the Senate and the House sponsors of those amendments. 132 Cong. Rec. S14,296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (adopting S. Rep. No. 221 as "set[ting] out the legislative history which should be consulted to determine the scope of the section we are adopting in this bill"); 132 Cong. Rec. H9465-66 (daily ed. Oct. 8, 1986) (joint statement of Reps. English and Kindness) (similar).

Consistent with this legislative history, the 1986 amendments to exemption 7 reflect the lawmakers' desire to limit the ability of drug traffickers and other lawbreakers to use FOIA to enhance their organized criminal activity. Among the enacted changes was the substitution of the words "could reasonably be expected to" for "would" in exemptions 7(A), 7(C), 7(D), and 7(F), which made it easier for the government to demonstrate facts necessary to satisfy those exemptions. *See* 5 U.S.C. § 552(b)(7) (1986).[11] Exemption 7(D) was amen-

[11] As amended in 1986, exemption 7 allows government withholding of:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> (A) could reasonably be expected to interfere with enforcement proceedings,
>
> (B) would deprive a person of a right to a fair trial or an impartial adjudication,
>
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
>
> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
>
> (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

ded to clarify and expand what agencies should understand the term "confidential source" to include, and what information may be withheld pursuant to that subsection. *See id.*; 132 Cong. Rec. S14,039 (statement of Sen. Hatch) (noting that protections for information submitted "only by" the confidential source in question might result in an absence of necessary protection in the event that multiple informants submit the same information). Exemption 7(E) was expanded to allow agencies to withhold information that would disclose law enforcement guidelines—in addition to the already protected techniques and procedures—if disclosure of the guidelines "could reasonably be expected to risk circumvention of the law." § 552(b)(7)(E).

Finally, exemption 7(F)'s authorization to withhold records to protect "law enforcement personnel" was expanded to allow withholding where release of the records in question "could reasonably be expected to endanger the life or physical safety of any individual." § 552(b)(7)(F). The amendment fixed the "special problem" FOIA had created for law enforcement by removing the "absurd" limitation on the exemption.

The defendants contend on this appeal that the 1986 amendment to exemption 7(F) altered it fundamentally, transforming it from a shield against specific risks incident to law enforcement investigations into a diffuse and nebulous authority for keeping inflammatory information secret (though, curiously, only inflammatory information in law enforcement files). As an initial matter,

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(F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7) (1986)

we note that the government had a different view at the time. Deputy Attorney General Dinkins's statement in support of the 1986 amendments described them as modifying the exemption only "slightly," in order to address the specific law enforcement concerns discussed above. 131 Cong. Rec. S248. The same view is expressed in the legislative history. *See, e.g.*, 132 Cong. Rec. H9462 (daily ed. Oct. 8, 1986) (statement of Rep. English) (the 1986 amendments make "only modest changes to the FOIA" and only "slight[ly]" expand exemption 7(F)).

More importantly, the defendants' argument for an expansive interpretation of the phrase "any individual" misapprehends the special problem the 1986 amendment was enacted to correct. Congress was concerned that criminals might deter or hinder law enforcement investigations by identifying those involved in such investigations and targeting the involved parties or associates or relatives to those parties. Accordingly, it relaxed the category of covered persons, extending its protection to individuals who were not themselves law enforcement personnel but who faced similarly specific threats of violence. What it did not do, and what the legislative history makes clear it never contemplated doing, was to reinvent exemption 7(F) as an all-purpose damper on global controversy. By requiring a showing of danger to an individual, Congress provided a constraint limiting exemption 7(F) to its intended scope—the protection of individuals subject to a non-speculative risk of harm incident to a law enforcement investigation. The defendants' attempt to sweep far-reaching and speculative national security concerns into exemption 7(F) reaches far beyond the intent of Congress in enacting or amending the provision.

4. *Subsequent Application of Exemption 7(F)*

Most courts that have upheld the government's reliance on exemption 7(F) have done so where the challenged nondisclosure sought to protect government agents, witnesses, informants, and others who have participated in law enforcement investigations or proceedings. *See Maydak v. U.S. Dep't of Justice*, 362 F. Supp. 2d 316, 321 n.4 (D.D.C. 2005) ("In general, [exemption 7(F)] has been interpreted to apply to names and identifying information of law enforcement officers, witnesses, confidential informants and other third persons who may be unknown to the requester." (citing cases)).[12] The defendants cite a handful of district court decisions in support of their expansive construction of the phrase "any individual" in the exemption. (*See* Appellants' Br. 30-34 (citing *L.A. Times Commc'ns, LLC v. Dep't of the Army*, 442 F. Supp. 2d 880, 900 (C.D. Cal. 2006); *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321 (D. Utah 2003); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 108 (D.D.C. 2002), *aff'd in part and rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003); *Brady-Lunny v. Massey*, 185 F.

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[12] *See also, e.g., Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001) (information about DEA agents who investigated FOIA plaintiff); *Shores v. FBI*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (information identifying three cooperating witnesses and others interviewed during investigation of FOIA plaintiff); *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) (information identifying government agents, private citizens and third parties who participated in investigation of FOIA plaintiff), *cf. Ruston v. Dep't of Justice*, No. 06-0224, 2007 WL 809698, at *6 (D.D.C. Mar. 15, 2007) (finding 7(F) inapplicable where government failed to establish "palpable risk" to BOP psychologist's life or physical safety if former inmate's FOIA request were to be granted).

Supp. 2d 928, 932 (C.D. Ill. 2002)).) These cases are neither controlling nor persuasive.

The defendants rely most heavily on *Living Rivers*, in which the government sought to withhold inundation maps of the area below the Hoover and Glen Canyon Dams. 272 F. Supp. 2d at 1314. The Bureau of Reclamation had created the maps to help the government evaluate the effects of a possible dam failure, and to protect the people living downstream from the consequences of such a failure. *Id.* at 1315-16. Since the maps revealed information about specific populated areas, critical infrastructures, and power plant sites that would be affected by dam failure, the government argued that disclosure of the maps could allow terrorists to endanger people who live downstream from the dams. *Id.* The court allowed the government to withhold the maps pursuant to exemption 7(F). *Id.* at 1322.

Like the other opinions cited by the defendants, *Living Rivers* fails to give serious consideration to the scope of exemption 7(F); to what the government must do to meet its burden of establishing danger to "any individual"; and to the lack of fit between an expansive reading of exemption 7(F) and FOIA's treatment of national security information.[13] In holding that persons living

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[13] The other cases the defendants cite give even less consideration than does *Living Rivers* to the question of how far exemption 7(F) can be extended. In *L.A. Times* the government sought to withhold the names of private security contractors ("PSC's") working in Iraq because of the risk that insurgents could use that information to organize attacks on vulnerable PSC's and their projects. 442 F. Supp. 2d at 898. The court upheld the government's reliance on exemption 7(F), but did so without any discussion of the exemption's scope. *Id.* at 900. Similarly, the brief discussion of exemption 7(F) in *Center for National Security Studies* examined only the causation component of the exemp-

downstream of the dams fell within exemption 7(F), the court stated that the exemption "is neither limited to protect the lives of 'law enforcement personnel,' nor to known, named individuals only." *Id.* at 1321. The defendants here make much of that statement—with which we agree—on this appeal. But it does not bear the weight *Living Rivers* or the defendants place on it. Exemption 7(F) is not limited to "known, named individuals." If disclosure of law enforcement records concerning the Cali cartel could reasonably be expected to endanger the lives of an informant's (or a witness's) extended family in Colombia, exemption 7(F) applies. Similarly, the disclosure of the identity of a person providing information about Sicilian drug trafficking might reasonably be expected to endanger that person's relatives and associates in Palermo. In those circumstances, the government need not even know, let alone name, all of those persons before it may properly invoke exemption 7(F) to

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tion, not the exemption's scope. *See* 215 F. Supp. 2d at 108 (accepting the government's representations that disclosure of locations of detention facilities in the United States holding people for investigation in the wake of September 11, 2001 would place life or physical safety at risk and noting an "absence of any contrary evidence, or any reason to discredit the government's representations"). Moreover, in affirming that decision, the D.C. Circuit relied solely on exemption 7(A), and made no mention of the district court's reliance on exemption 7(F). *See Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 933-34 (D.C. Cir. 2003). Finally, as noted in Section B.1, *Brady Lunny v. Massey* misquotes the exemption, *compare* 185 F. Supp. 2d at 932 ("'Under 5 U.S.C. § 552(b)(7)(F), the Government is exempt from disclosing information about any individual that 'could reasonably be expected to endanger life or physical safety.'"), *with* 5 U.S.C. § 552(b)(7)(F) (exempting law enforcement records from disclosure only if production of the records "could reasonably be expected to endanger the life or physical safety of any individual"), before, like the foregoing cases, simply assuming the issue currently before us.

protect them. Indeed, as discussed above, that was the purpose of enlarging the exemption's protection in 1986 from "law enforcement personnel" to "any individual." But saying that the government does not need to identify an individual by name does not imply that the government does not need to identify an individual *at all*, or that the government may identify an individual only as being a member of a vast population. *Living Rivers* does not attempt to justify that leap of logic, citing no authority regarding how specifically the individuals contemplated by exemption 7(F) must be identified.[14]

Living Rivers' construction of exemption 7(F) may have been influenced by the absence of any allegation of governmental misconduct in that case. We agree with the defendants that once exemption 7(F) is deemed applicable and the requisite risk of harm is demonstrated, the exemption does not call for or even permit a balancing of that risk against the public's interest. But the interest of the public in "greater access to information" must be considered in determining the scope of exemption 7(F) in the first place. *See John Doe Agency*, 493 U.S. at 157 ("[The Court] has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure."). Unlike in *Living Rivers*, the facts of this

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[14] It does cite *Garcia*, 181 F. Supp. 2d at 378, which supports the proposition that the individuals at risk need not be law enforcement personnel. *Living Rivers*, 272 F. Supp. 2d at 1321. But *Garcia*, which applied exemption 7(F) to justify withholding the names and identifying information for several private citizens who provided information to the FBI, 181 F. Supp. 2d at 378, provides no support for the proposition that the government need not identify the individuals in question, or that it may do so in the most general terms.

case place governmental accountability at the center of the dispute. In a respect that court had no reason to consider, we must be especially mindful that exemptions to FOIA are to be "narrowly construed," *Abramson*, 456 U.S. at 630.

In any event, while *Living Rivers* applied a relaxed standard to the government's identification of an individual who could reasonably be expected to be endangered, even that court did not go as far as the defendants wish to here. The court in *Living Rivers* applied exemption 7(F) to protect a specific, identifiable set of individuals. Though the persons at risk in the event of dam failures were not individually named, they hardly represented "the public at large," as the defendants have argued. (*See* Appellants' Reply Br. 8.) To the contrary, they resided within the specific areas identified in the maps at issue. They may have been numerous, but unlike the population at issue here there is no suggestion in that case that they could not all have been specifically identified.

It is worth remarking that the defendants' interpretation of 7(F) is currently idiosyncratic. The robust public debate on the choice between law enforcement and other methods in formulating our national security policy has been devoid, to our knowledge, of any mention of law enforcement's broader shroud of secrecy under FOIA than non-law-enforcement national security operations—mention one would expect to find if the government's view of exemption 7(F) were the law. *Cf.* Michael Sherman, *FOIA in the Aftermath of 9/11*, 19 St. Thomas L. Rev. 281, 293 (2006) ("To date, Exemption 7F has not played a major role in post-9/11 FOIA case law.")

Instead, virtually every court having occasion to interpret exemption 7(F) has been called upon to determine whether the disclosure of law enforcement records could reasonably be expected to endanger the life or physical safety of any individuals who participated in some way in the investigation, be they law enforcement employees, informants, or witnesses, or others associated in some way with those persons. Significantly, the defendants themselves first invoked exemption 7(F) in precisely this way. Their initial resort to the exemption in the district court sought to protect only "the identities of citizens of Iraq or Afghanistan who may have cooperated with [Army] CID or other U.S. forces." (Third Declaration of Phillip J. McGuire, July 20, 2005, ¶ 13.) It was only two months after oral argument of the cross-motions for summary judgment that they dramatically expanded their application, converting a law enforcement matter into a national security issue.

Although this is one of the first cases to examine whether exemption 7(F) can be conscripted into service as an ersatz classification system, it is unlikely to be the last. The defendants' reassurances that their rule would be "[l]imited to the [f]acts [p]resented by [t]his [c]ase," (Appellants' Reply Br. 17), ring hollow. While it is true, as the defendants contend, that expert affidavits deem these particular documents to pose such a danger, we have no doubt that similar affidavits could be produced with respect to many other documents in a wide range of cases, particularly controversial documents that the government might have the greatest motivation to withhold. (*See* Appellees' Br. 20 ("[The government's argument] leads to the perverse conclusion that the more egregious the misconduct revealed by government records, the more compelling would be the government's basis for

shielding these documents from disclosure under FOIA.").) This is not due to any question regarding the good faith or the expertise of the affiants, but rather to the fact that even remote possibilities can become reasonable to expect to befall at least one member of a large enough group. An expert could in good faith claim that it is reasonable to expect that disclosure of any number of documents could endanger the life or physical safety of at least one person in the world.[15] The government's contention that "any individual" encompasses a person identified only as belonging to of a population of national size would, if accepted, circumvent the limitation imposed by the phrase "could reasonably be expected to endanger." It would radically transform exemption 7(F) from a flexible but tailored protection for a fluid but limited class of persons into an alternative secrecy mechanism far broader than the government's classification system. As such a result would read "individual" out of the provision and would create anomalous disparities between the treatment of law enforcement and non-law enforcement national security information, we decline to so transfigure exemption 7(F).

C. *FOIA Exemptions 6 and 7(C)*

FOIA exemptions 6 and 7(C) protect against disclosure that implicates personal privacy interests. The government may withhold records in "personnel and medical files and similar files" only when their release "would constitute a clearly unwarranted invasion of per-

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[15] While the defendants here claim endangerment only to persons drawn from the populations of two nations and not the entire world, the defendants' reading of exemption 7(F) does not provide any limiting principle.

sonal privacy." 5 U.S.C. § 552(b)(6) (2006). However, when law enforcement records are involved, the government may withhold records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." § 552(b)(7)(C). Since the Army photos are considered law enforcement records for the purposes of exemption 7, and are also part of personnel files of the soldiers depicted in the photographs, they are eligible for withholding if the defendants satisfy the standards of either exemption.

Exemption 7(C) is more protective of privacy than exemption 6 because it does not require an invasion of privacy to be *clearly* unwarranted before withholding is allowed, and it may take effect not only when an invasion of privacy "would" occur, but when it could reasonably be expected to occur. *See Favish*, 541 U.S. at 165-66. Because exemption 7(C) offers broader protection than exemption 6—and a lower evidentiary standard for the defendants—a decision that exemption 7(C) does not allow withholding also forecloses the defendants' reliance on exemption 6. We turn, then, to an examination of exemption 7(C).[16]

1. *The Detainees' Privacy Interest*

In the FOIA context, the Supreme Court has recognized an individual privacy interest in "avoiding disclo-

[16] Still, because these two exemptions involve related standards, precedent applying exemption 6 is relevant to our analysis of exemption 7(C). *See Reporters Committee*, 489 U.S. at 768 (applying exemption 6 caselaw to analysis of exemption 7(C)); *see also FLRA*, 958 F.2d at 509 (holding the same degree of privacy interest is required to trigger balancing pursuant to exemptions 6 and 7(C), though once a privacy interest is implicated the two exemptions provide differing levels of protection).

sure of personal matters." *Reporters Committee*, 489 U.S. at 762 (internal quotation omitted). "[O]nce a more than *de minimis* privacy interest is implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA." *FLRA*, 958 F.2d at 510. Disclosure of personal information "constitutes only a *de minimis* invasion of privacy" when identities are unknown. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 176 (1991).

Applying these principles to the privacy interests of the detainees depicted in the Abu Ghraib photos in reasoning it later applied to the Army photos, the district court determined that publication of the photos in a form in which "all identifying characteristics of the persons in the photographs have been redacted" would not cause a cognizable invasion of personal privacy. *ACLU*, 389 F. Supp. 2d at 571. Where "individual recognition could not be prevented without redaction so extensive as to render the images meaningless," the court ordered those photographs to be withheld. *Id.* at 572. The court dismissed as speculative the risk that persons depicted in the photographs might recognize themselves or be recognized by members of the public in spite of the redactions. *Id.*

The district court also rejected arguments that release of the photographs would conflict with the Geneva Conventions' requirement that detaining powers protect any prisoner of war against insults and "public curiosity." *Id.* at 574. Instead, the court found that redaction is adequate to protect the detainees' identities and to preserve their honor. *Id.*

The defendants now argue that the redactions approved by the district court are inadequate to protect the privacy interests of the detainees. According to the

defendants, when combined with information contained in the investigative reports associated with the detainee images, release of the photographs could make it possible to identify the detainees. The defendants also assert that there is a chance that the pictured detainees could identify themselves in any redacted photos released. The defendants emphasize that (a) "Congress and the courts have recognized that victims of crimes or mistreatment, such as the detainees in this case, should not be forced to relive their suffering and humiliation as a result of Government disclosures," (Appellants' Br. at 48); (b) the Supreme Court has recognized a strong privacy interest in "sensitive personal information," (*id.*); and (c) the Geneva Conventions obligate a detaining power to respect the dignity of detainees and avoid exposing them to "public curiosity," (*id.* at 51-52). For these reasons, the defendants assert that the release of images that could lead to the identification of the detainees by themselves or others presents an invasion of the detainees' privacy.[17]

FOIA provides that "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records [produced in response to other FOIA requests and made publicly available due to the likelihood of future requests]." § 552(a)(2). FOIA further states that

[17] The defendants have not relied on any privacy interest of the soldiers depicted in the Army photos, and we do not address that issue here. The district court considered the privacy rights of the soldiers during the redaction hearing, and found that where they appeared to pose for photographs, their consent removed any privacy interest that might otherwise have warranted redaction of their identifying features.

"[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." § 552(b).

Accordingly, courts have found redaction of identifying information adequate to prevent infringement of the significant interests that FOIA's privacy exemptions were designed to protect. *See Ray*, 502 U.S. at 175-78 (finding that redaction was appropriate to safeguard personal privacy of Haitian nationals interviewed by State Department in connection with their involuntary repatriation); *Rose*, 425 U.S. at 354-58, 381 (affirming redaction of personal references and other identifying information in Air Force Academy disciplinary records).[18] A court may also order information released without proposed redactions where the government fails to demonstrate a risk of identification in the absence of the redactions. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 485-86 (2d Cir. 1999) (ordering unredacted release of broader set of information where "it is not at all clear" from the government's submissions "that disclosure would, in fact, lead to the identification of the persons who provided the documents").

In this case, the district court held in camera proceedings to ensure the adequacy of proposed redactions to the Army photos. During those proceedings the court learned of the context of each photograph, including

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[18] Outside the FOIA context, we have found that where the public right of access to judicial documents competes with privacy rights, "it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document." *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995).

matters related to how the government came to possess the images, the location of events depicted, and the units that military personnel were assigned to. After examining each of the 29 photographs, the court determined which were to be released and the extent of redaction necessary to shield the identities of individuals depicted. At no point while viewing the Army photos did the district court note the possibility that a detainee could be identified in spite of the redactions. Having inspected the photographs and the redactions ourselves, we have no doubt that the district court examined the Army photos with an aim to redact "all identifying characteristics of the persons in the photographs," *ACLU*, 389 F. Supp. 2d at 571, and that it did so adequately.

The defendants have cited no FOIA case in which a court has found a privacy right to be at risk where identifying information has been adequately redacted. Even accepting their argument that it may be "possible" to identify the detainees in spite of the district court's redactions, or that there remains a "chance" that the detainees could identify themselves, (Appellants' Br. 47), such speculation does not establish a privacy interest that surpasses a *de minimis* level for the purposes of a FOIA inquiry. *Cf. Halpern v. FBI*, 181 F.3d 279, 297-98 (2d Cir. 1999) (holding that government must describe withheld material with "'reasonable' level of specificity" for courts to be able to determine whether exemption 7(C) applies); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (calling for "reasonably detailed explanations why any withheld documents fall within an exemption"). Indeed, because the district court has redacted the Army photos to remove all identifying features, there is no cognizable privacy interest at issue in the release of the Army photos.

The defendants' attention to the privacy rights of crime victims and to the concerns associated with personal information does not alter the above analysis. Factors that may give rise to a heightened privacy interest include the presence of sensitive personal information, dignity of crime victims, and the risk of harm to reputation. *See Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995) (recognizing that the magnitude of a privacy interest turns on whether disclosure may result in unwarranted association with criminal activity or reputational harm). However, such a privacy right attaches when information that is sensitive may be linked to certain individuals, not when the individuals involved are unknown.

For example, in *Favish*, the Supreme Court applied exemption 7(C) to allow the withholding of photographs of the death-scene of Vincent Foster, former Deputy Counsel to the President, after reports that his death was the result of suicide. 541 U.S. at 169-71, 175. Implicit in the Court's discussion of the privacy rights of members of Foster's family with respect to images of scenes of his death was that the images depict an individual whose identity was widely known to the public. The privacy right attached to Foster's family members "to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility." *Id.* at 166. If Foster's identity were unknown, such a privacy interest would not arise.

In *Ray*, the Supreme Court recognized that disclosure of identities of Haitians who were repatriated after attempts to enter the United States could subject them or their families to "embarrassment in their social and community relationships," 502 U.S. at 176 (internal quo-

tation omitted), but that redaction of names resulted in a diminished privacy interest, *see id.* ("Although disclosure of such personal information constitutes only a *de minimis* invasion of privacy when the identities of the interviewees are unknown, the invasion of privacy becomes significant when the personal information is linked to particular interviewees.").[19]

Notwithstanding the defendants' assertions that redactions of the Army photos do not eliminate the possibility that the detainees in the photographs might be

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[19] One non-FOIA case cited by the defendants, *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004), supports the notion that a privacy interest may be at risk even where identities are unknown. In *Northwestern*, the government subpoenaed medical records of certain patients who received late-term abortions. *Id.* at 924. The records would be used in aid of the government's constitutional challenge to the Partial Birth Abortion Act of 2003, 18 U.S.C. § 1531, and would include details related to the patients' medical and sexual history. *Id.* at 929. In rejecting the government's efforts to gain access to such information for the purposes of litigation, the court noted the following:

> Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded. The revelation of the intimate details contained in the record of a late-term abortion may inflict a similar wound.

Northwestern, 362 F.3d at 929. *Northwestern*, however, based its holding not on this hypothetical privacy analysis but on the patients' fear of recognition and retaliation in light of the highly charged political controversy regarding abortion; the possibility that many pregnant women would not understand the redactions to protect their privacy; and the high likelihood of actual recognition despite the redactions. *Id.* at 928-29. *Northwestern* is thus inapplicable here.

identified (even if only by themselves), we find the district court's redactions of identifying features sufficient to warrant the conclusion that the photographs do not implicate the detainees' privacy interests pursuant to FOIA exemption 7(C). *Cf. Rose*, 425 U.S. at 381-82 (upholding disclosure of redacted records under exemption 6 while acknowledging that "redaction cannot eliminate all risks of identifiability").

Even though we are not compelled to balance interests where there is no more than a *de minimis* privacy interest at stake, we note that contrary to the defendants' suggestion there is a significant public interest in the disclosure of these photographs. The defendants concede that these photographs yield evidence of governmental wrongdoing, but nonetheless argue that they add little additional value to the written summaries of the depicted events, which have already been made public. This contention disregards FOIA's central purpose of furthering governmental accountability, and the special importance the law accords to information revealing official misconduct. *Robbins*, 437 U.S. at 242 ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." (internal citation omitted)). The defendants cite several cases in which public information rendered the incremental value of additional disclosure too slight to outweigh privacy interests,[20] but the

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[20] *See, e.g., Miller v. Bell*, 661 F.2d 623, 630-31 (7th Cir. 1981) (per curiam) (holding identifying information about FBI agents to be covered by exemption 7(C) and noting that public documents already provided substantial information about FBI's investigation), *abrogated in part on other grounds by U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993); *N.Y. Times Co. v. NASA*, 782 F. Supp. 628, 632-33

court in each of those cases expressly found that there was no reason to believe the information would document government misconduct.[21] Governmental misconduct is conceded here, (Appellants' Br. 15 (noting that several personnel were disciplined in connection with the Army CID investigations)), and we accordingly note that the public interest in disclosure of these photographs is strong. In any event, there is no more than a *de minimis* privacy interest in withholding the redacted photographs.

2. *The Geneva Conventions*

The defendants argue that the Geneva Conventions, which protect prisoners of war and detained civilians "against insults and public curiosity," serve as further basis for a finding that FOIA's privacy provisions apply to prevent release of the Army photos. The Third Geneva Convention, covering lawful belligerents, provides that "prisoners of war must at all times be pro-

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(D.D.C. 1991) (withholding audio recording of final words of astronauts in space shuttle disaster under exemption 6 in part because transcript was already public); *In re KSTP Television*, 504 F. Supp. 360, 362-64 (D. Minn. 1980) (concluding common law right of access to public records did not justify disclosure of videotapes of blindfolded and bound kidnap victim when information had been made public at trial).

[21] *See Miller*, 661 F.2d at 630 ("There is no allegation of wrongdoing by high-ranking government officials or indeed by any FBI personnel to support any public interest in any further probe into the thoroughness of the instant investigation."); *N.Y. Times*, 782 F. Supp. at 633 (finding information on tapes "sheds absolutely no light on the conduct of any Governmental agency or official"); *KSTP Television*, 504 F. Supp. at 363 ("In [the Abscam] case there was a definite public interest in release of the tapes because the tapes involved the alleged wrongdoing of elected public officials. There is, however, no public interest to be served by release of the tapes here. . . .").

tected, particularly against acts of violence or intimidation and against insults and public curiosity." Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Third Geneva Convention]. The Fourth Geneva Convention, covering civilians, states:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention]. Both of these treaties were designed to prevent the abuse of prisoners. Neither treaty is intended to curb those who seek information about prisoner abuse in an effort to help deter it.

However, government officials have concluded that release of photographs like the ones in this case would clash with the Geneva Conventions by subjecting the detainees depicted in the photos to public curiosity. (*See* Declaration of Geoffrey S. Corn, March 25, 2005, ¶ 5 ("[R]elease of [the Abu Ghraib] photographs, even with obscured faces and genitals, would be inconsistent with the obligation of the United States to treat the individuals depicted humanely and would pose a great risk of subjecting these individuals to public insult and curiosity."); Declaration of Richard B. Jackson, April 25, 2006, ¶ 9 (release of the Army photos will subject detainees to public curiosity because "[e]ven if the identities of the

subjects of the photographs are never established . . . each individual beneficiary of these treaty protections will undoubtedly suffer the personal humiliation and indignity accordant with the knowledge that these photographs have been placed in the public domain").)

The defendants do not claim that the Geneva Conventions constitute specific statutory authorization to withhold these photographs under FOIA's exemption 3, § 552(b)(3), but rather that FOIA should be read to be consistent with the Geneva Conventions, *see Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . . "). We note that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty," *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168-69 (1999), so long as it has been "consistently adhered to by the Executive Department of the Government," *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921). The defendants' current litigation position, however, is not at all consistent with the executive branch's prior interpretations of the Geneva Conventions.

As an initial matter, the government does not currently interpret the Geneva Conventions to prohibit dissemination of photographs or videos of detainees when those detainees are not identifiable. (*See, e.g.*, Jennifer K. Elsea, *Congressional Research Service Report for Congress: Lawfulness of Interrogation Techniques under the Geneva Conventions*, at CRS-19 (2004) ("[T]he Department of Defense interprets the [Third Geneva Convention] to protect POWs from being filmed or photographed in such a manner that viewers would be able

to recognize the prisoner. Photos and videos depicting POWs with their faces covered or their identities otherwise disguised [do] not, in the view of the Department of Defense, violate GPW art. 13."). However, the defendants note that the government's current practice does not allow dissemination of photographs of detainees being abused, even if they are not identifiable. (Appellants' Br. 52-53; Appellants' Reply Br. 23-25.) The defendants argue that a photograph of abuse is so humiliating that its dissemination always opens the detainee to "public curiosity," even if the detainee cannot be identified. But this was not always the government's interpretation of the Geneva Conventions.

Prior to this litigation, the United States has not consistently considered dissemination of photographic documentation of detainee mistreatment to violate the public curiosity provisions of the Geneva Conventions, at least not when the detainee is unidentifiable and the dissemination is not itself intended to humiliate. The 1929 Geneva Conventions, in force during World War II, provided prisoners of war the same protection from "public curiosity" that the Third and Fourth Geneva Conventions offer to prisoners of war and civilians. *Compare* Convention Relative to the Treatment of Prisoners of War art. 2, July 27, 1929, 47 Stat. 2021 ("[Prisoners of war] must at all times be humanely treated, and protected, particularly against acts of violence, insults and public curiosity.") *with* Third Geneva Convention, *supra*, art. 13 ("Prisoners of war must at all times be humanely treated. . . . Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."). At the end of the war, the United States government widely disseminated photographs of prisoners in

Japanese and German prison and concentration camps. (Declaration of Scott F. Horton, Apr. 27, 2005, ¶ 17.). These photographs of emaciated prisoners, corpses, and remains of prisoners depicted detainees in states of powerlessness and subjugation similar to those endured by the detainees depicted in the photographs at issue here. Yet the United States championed the use and dissemination of such photographs to hold perpetrators accountable.

The government responds that the individuals in the World War II photographs were not in the military custody of the United States, and thus the United States was under no duty to protect them from public curiosity. Therefore, the argument continues, there is no inconsistency between the United States' actions in publicizing photographs documenting German and Japanese detainee abuse and its current position that publicizing photographs documenting its own abuse of detainees would violate the Geneva Conventions. On this clever interpretation, the United States at the end of World War II was properly facilitating "public curiosity," but Nazi Germany and Imperial Japan were obligated by the 1929 Geneva Conventions to defeat those efforts to document their violation of the 1929 Geneva Conventions. We are not persuaded. The far more sensible interpretation of the United States' position is that the United States did not at that time consider documentation of Geneva Convention violations in order to hold the perpetrators accountable to constitute "public curiosity," even when the documentation included photographs of detainees subject to mistreatment.

Further, the defendants' contention that documentation of detainee abuse constitutes public curiosity is im-

possible to square with the United States' role as the lead prosecuting party of Imperial Japanese General Sadao Araki and others before the International Military Tribunal for the Far East ("IMTFE"). In that case, the IMTFE found the Japanese government's *censorship* of photographs depicting mistreatment of prisoners of war to be evidence of the government's complicity in war crimes, including violations of the 1929 Geneva Conventions. *See United States v. Sadao Araki* (Int'l Mil. Trib. for the Far East Nov. 4-12, 1948), *reprinted in 60 International Law Studies* 437, 460-67, 472-76 (Howard S. Levie ed. 1979). The United States' leading role in that prosecution would have been odd, to say the least, if the United States at the time took the position that the dissemination of photographs showing prisoners of war subject to mistreatment was itself a war crime.

In light of this contrary past practice, we do not defer to the government's current litigation position concerning the meaning of the "public curiosity" provisions of the Third and Fourth Geneva Conventions. *See, e.g., Perkins v. Elg,* 307 U.S. 325, 339-49 (1939) (declining to defer to executive's interpretation of treaty in light of past practice of contrary interpretation of similar treaties). We hold that Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention do not prohibit dissemination of images of detainees being abused when the images are redacted so as to protect the identities of the detainees, at least in situations where, as here, the purpose of the dissemination is not itself to humiliate the detainees. *(Cf.* Appellants' Br. 53 (considering possibility of detainees being "subjected to mistreatment through the streets" while hooded).) This construction is consistent with the past practice of the United States. It is also the construction publicly adop-

ted by the International Committee for the Red Cross ("ICRC"), which has "had a significant influence on the interpretation of Article 13," (Cummings Decl. 17). *See Pics "Not Breaching Convention,"* News24.com (May 21, 2004), http://www.news24.com/News24/World/Iraq/0,,2-10-1460_1530825,00.html (noting that ICRC spokesperson stated that photographs of detainee abuse could be released if faces and identifying features are obscured).

More importantly, this construction is consistent with the purpose of furthering humane treatment of captives, which animates Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention. *See Senator Linie Gmbh & Co. Kg v. Sunway Line, Inc.*, 291 F.3d 145, 153 n.7 (2d Cir. 2002) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." (quoting Vienna Convention on the Law of Treaties art. 31.1, May 23, 1969, 1155 U.N.T.S. 331)); *see also* Int'l Comm. for the Red Cross, *Commentary: Convention (III) Relative to the Treatment of Prisoners of War* 140 (Jean S. Pictet ed. 1960), *available at* http://www.icrc.org/ihl.nsf/COM/375-590017 ("The requirement that protected persons must at all times be humanely treated is the basic theme of the Geneva Conventions.") [hereinafter *ICRC Commentary*]; *cf. United States v. Noriega*, 808 F. Supp. 791, 795 n.6 (S.D. Fla. 1992) ("While the Red Cross Commentary is not part of the treaty and is not binding law, it is widely recognized as a respected authority on interpretation of the Geneva Conventions."). Release of the photographs is likely to further the purposes of the Geneva Conventions by deterring future abuse of prisoners. To the extent the public may

be "curious" about the Army photos, it is not in a way that the text of the Conventions prohibits; curiosity about "enemy prisoners being subjected to mistreatment through the streets," (Appellants' Br. 53), is different in kind from the type of concern the plaintiffs seek to inspire. *See ICRC Commentary, supra*, at 141 (characterizing "public curiosity" provision as concerned with protecting "honour" of prisoners). Heightened public awareness of events depicted in the Army photos—some of which appear to violate the Geneva Conventions—would serve to vindicate the purposes of the Geneva Conventions without endangering the lives or honor of detainees whose identities are protected.

As the Third and Fourth Geneva Conventions do not prohibit disclosure of photographs of detainee abuse when, as here, the photographs are redacted and the disclosure is not itself intended as an act of humiliation, no need arises to alter the standard analysis under FOIA's exemption 6 and 7(C) in order to construe that statute to be consistent with those conventions. Therefore, the defendants' expressed desire to comply with the Geneva Conventions does not elevate the privacy interests in withholding the redacted Army photos above a *de minimis* level.[22]

CONCLUSION

As stated above, the defendants have failed to identify an individual who could reasonably be expected to be endangered within the meaning of exemption 7(F). The district court's redactions are sufficient to render

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[22] We note in passing that the defendants did not produce any evidence that any detainees pictured wished the redacted photographs to be withheld in order to protect their privacy.

inapplicable exemptions 6 and 7(C), even in light of the Third and Fourth Geneva Conventions. Accordingly, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 4151 (AKH)

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

DEPARTMENT OF DEFENSE, ET AL., DEFENDANTS

[Filed: June 21, 2006]

SUPPLEMENTAL ORDER RELEASING PHOTOGRAPHS

ALVIN K. HELLERSTEIN, U.S.D.J.:

In connection with the parties' pending cross motions for summary judgment, the Court on June 8, 2006, reviewed *ex parte* and *in camera* twenty nine photographs taken by individuals serving in Iraq and Afghanistan, submitted to me by the government as responsive to Plaintiff's request for videotapes, photographs and other records depicting abuse in Iraq. Based upon my review of the color photographs, by Order dated June 9, 2006, I ordered the Government to release twenty of the twenty nine photographs, with redacting of identifying facial features in certain of the photos. I reserved decision on the photographs marked exhibits GXB F-1 and

F-2. The parties having entered into a stipulation regarding the two remaining photographs, it is hereby

ORDERED that the Government shall release, pursuant to my holdings set out in my Opinion and Order Granting in Part and Denying in Part Motions for Partial Summary Judgment dated September 29, 2005, 389 F. Supp. 2d 547, 568-79, the photograph marked exhibit GXB F-1; and it is further

ORDERED that the Government shall redact identifying facial features from the photograph marked as exhibit GXB F-1, and release it as redacted; and it is further

ORDERED that the Government is not required to release the photographs marked as exhibits GXA and GXB F-2, as the parties have stipulated that plaintiffs do not object to the Government withholding photo F-2 in its entirety because it is not responsive.

Dated: New York, New York
June 21, 2006

/s/ ALVIN K. HELLERSTEIN
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 4151 (AKH)

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

DEPARTMENT OF DEFENSE, ET AL., DEFENDANTS

[Filed: June 9, 2006]

ORDER

ALVIN K. HELLERSTEIN, U.S.D.J.:

In connection with the parties' pending cross motions for summary judgment, the Court on June 8, 2006, reviewed *ex parte* and *in camera* twenty nine photographs taken by individuals serving in Iraq and Afghanistan, submitted to me by the government as responsive to Plaintiff's request for videotapes, photographs and other records depicting abuse in Iraq. Based upon my review of the color photographs, in Government Exhibit A ("GXA") and the black and white photographs in Government Exhibit B ("GXB") (both color and black and white being the same), it is hereby

ORDERED that the Government shall release, pursuant to my holdings set out in my Opinion and Order Granting in Part and Denying in Part Motions for Partial Summary Judgment dated September 29, 2005, 389 F. Supp. 2d 547, 568-79, the photographs marked exhibits GXB A-6, A-7, A-8, B-1, B-2, C-1, D-1, E-1, E-2, E-3, E-4, E-5, E-6, E-7, E-8, E-9, E-10, E-11, E-12, and E-13; and it is further

ORDERED that the Government shall redact identifying facial features from the photographs marked as exhibits GXB A-6, A-7, A-8, B-1, B-2, C-1, E-1, E-2, E-3, E-4, E-5, E-6, E-7, E-8, E-9, E-10, E-11, E-12, and E-13, and release them as redacted; and it is further

ORDERED that the Government is not required to release the photographs marked as exhibits GXA and GXB A-1, A-2, A-3, A-4, A-5, G-1, and G-2, as the Court has determined that these photographs are not responsive; and

Judgment is reserved regarding F-1 and F-2.

SO ORDERED.

Dated: New York, New York
June 9, 2006

/s/ ALVIN K. HELLERSTEIN
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 4151 (AKH)

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE AND VETERANS FOR PEACE, PLAINTIFFS

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION; DEPARTMENT OF STATE; AND CENTRAL INTELLIGENCE AGENCY, DEFENDANTS

[Filed: Apr. 10, 2006]

ORDER

WHEREAS, Plaintiffs-Appellees submitted requests under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), seeking, *inter alia*, the release of photographs and videos that were contained on a CD provided by Joseph Darby to the Department of Army Criminal Investigations Command and that depicted the treatment of detainees at Abu Ghraib prison (collectively, the "Darby Photos");

WHEREAS, the Department of Defense ("DOD") and Department of the Army ("DOA") asserted that the Darby Photos were properly withheld from release pursuant to FOIA Exemptions 6, 7(C) and 7(F);

WHEREAS, this Court reviewed the Darby Photos *ex parte* and *in camera* on two occasions and narrowed the number of images that were potentially appropriate for release to 74 photos and 3 videos;

WHEREAS, in an opinion dated September 29, 2005, this Court ordered that DOD and DOA release the relevant 74 photos and 3 videos after appropriate redaction;

WHEREAS, DOD and DOA appealed this Court's order requiring release of the Darby Photos to the United States Court of Appeals for the Second Circuit;

WHEREAS, after the filing of the appeal by DOD and DOA in the Second Circuit, images were published on the website *www.salon.com* purporting to depict the treatment of detainees at Abu Ghraib prison;

WHEREAS, DOD and DOA subsequently entered into a stipulation and proposed order with plaintiffs providing for the dismissal of the appeal relating to the Darby Photos without further litigation and before re-

ceiving a ruling from the Second Circuit regarding the legal issues raised by that appeal;

WHEREAS, on April 3, 2006, the Second Circuit entered a Stipulation and Order dismissing the appeal on the Darby Photos;

WHEREAS, DOA represents that: (a) there are 29 other photos and 2 videos that are responsive to Plaintiffs' FOIA requests in this action and that are being withheld from release by DOD and DOA based solely upon FOIA Exemptions 6, 7(C) and/or 7(F) (the "Other Responsive Images"); and (b) the Other Responsive Images are the only other images in the possession of DOA that are responsive to Plaintiffs' FOIA requests and are being withheld solely on the basis of FOIA Exemptions 6, 7(C) and/or 7(F);

WHEREAS, the parties have reached an agreement regarding how to most efficiently and expeditiously litigate whether the Other Responsive Images can be withheld under FOIA Exemptions 6, 7(C) and/or 7(F); and

WHEREAS, the parties agree that the most efficient and expeditious way to resolve whether the Other Responsive Images should be released under FOIA is to create a record consisting of declarations that will supplement the record previously made before this Court on the Darby Photos and FOIA Exemptions 6, 7(C) and 7(F);

NOW, THEREFORE, it is hereby agreed between the parties and ORDERED as follows:

1. On or before April 25, 2006, the Government shall file with the Court any declarations in support of its in-

vocation of Exemptions 6, 7(C) and/or 7(F) as to the Other Responsive Images.

2. On or before May 23, 2006, Plaintiffs will submit any declarations in response to the Government's submission as to the Other Responsive Images, and the Government will submit any additional declarations in reply within ten calendar days of plaintiffs' submission; if plaintiffs do not submit any additional declarations but rather rely upon declarations previously submitted to the Court relating to the Darby Photos, the Government will not submit any further declarations as to the Other Responsive Images without seeking leave of this Court for good cause shown.

3. To the extent that the withholding of the Other Responsive Images involves the same legal issues raised by the Darby Photos, the parties will not submit additional legal memoranda on Exemptions 6, 7(C) and 7(F), and the Court may instead rely upon the legal briefing previously submitted by the parties on these issues. To the extent that the parties need to address any new legal issues raised by the Other Responsive Images, the parties shall do so in letter briefs to the Court not to exceed three pages and these letter briefs shall be submitted simultaneously with the filing of the parties' declarations.

4. The Court will consider the parties' submissions, set forth in paragraphs 1-3 above, as cross-motions for summary judgment regarding whether the Other Responsive Images must be released under FOIA.

5. After the Court issues its decision as to the Other Responsive Images, the parties will determine whether to appeal that decision on an expedited basis and will file

any notice of appeal no later than 14 days of the Court's decision; during those 14 days, any order of release that the Court might issue as to the Other Responsive Images will be stayed.

6. To the extent that DOD has any responsive images in its possession that have been or will be withheld based in this case solely based on FOIA Exemptions 6, 7(C), and/or 7(F), the question of whether these other DOD responsive images should be released under FOIA Exemptions 6, 7(C) and/or 7(F) will be governed by the final ruling on appeal as to the Other Responsive Images.

Dated: New York, New York
April 10, 2006

FOR PLAINTIFFS

/s/ AMRIT SINGH
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Dated: New York, New York
April 10, 2006

FOR DEFENDANTS:

MICHAEL J. GARCIA
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By: /s/ SEAN H. LANE
SEAN H. LANE (SL-4898)
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So ordered this 10 day of April, 2006

/s/ ALVIN K. HELLERSTEIN
HON. ALVIN K. HELLERSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 4151 (AKH)

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

DEPARTMENT OF DEFENSE, ET AL., DEFENDANTS

[Filed: Sept. 29, 2005]

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR PARTIAL SUMMARY JUDGMENT

ALVIN K. HELLERSTEIN, U.S.D.J.:

The American Civil Liberties Union and other plaintiffs have demanded that the government produce relevant documents concerning the "treatment of Detainees in United States custody," the "death of Detainees in United States custody," and the "rendition of Detainees and other individuals" to countries known to employ torture. Plaintiffs' demands under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, were first made on October 7, 2003. The government, after being inattentive for many months to the obligations imposed on it by

FOIA, *see Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004) ("Opinion and Order of September 15, 2004"), has made large, but not complete, production, reviewing and turning over thousands of documents from various of its agencies. The present motions relate to documents claimed to be possessed by, or of concern to, two government agencies, the Department of Defense ("DOD") and the Central Intelligence Agency ("CIA").

More than one year ago, on August 16, 2004, in order to facilitate the government's processing of documents, plaintiffs created a priority list of enumerated documents (the "August 16, 2004 List"). The priority list was a subset of previous demands that plaintiffs most wished to be produced and which, based on public references to such documents, plaintiffs believed the government could readily process. The priority list focused on specifically identified records, such as records "provided by defendant agencies to Congress, members of Congress, or congressional committees," or "discussed or identified in the media." My Opinion and Order of September 15, 2004 set out an expedited procedure with respect to the August 16, 2004 List.[1] Specifically, the government was required to produce the documents responsive to the List, or provide a declaration showing that an exemption against production applied, *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), following which there would be motions for partial summary judgment

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[1] With respect to the remainder of plaintiffs' outstanding requests, the Opinion and Order of September 15, 2004 required the government to produce responsive documents or identify them in a log to be publicly filed or examined *ex parte* and *in camera*.

to resolve disputes regarding documents claimed to be exempt.

Initially, defendant CIA took the position that it did not have to search its operational files and identify responsive documents, claiming an exemption by statute. *See* CIA Information Act, 50 U.S.C. § 431. However, the CIA Information Act itself provides exceptions to the exemptions from FOIA that it affords the CIA, and I held that since the agency had already conducted a search pursuant to an investigation of its Inspector General into allegations of improprieties of CIA operatives in Iraq, the statute by its explicit terms no longer exempted the CIA from its obligations under FOIA to search. I ordered the CIA to search its investigative files for responsive documents, and either to produce them or show them to be exempt. *See Am. Civil Liberties Union v. Dep't of Def.*, 351 F. Supp. 2d 265 (S.D.N.Y. 2005) (Opinion and Order of February 2, 2005, modified, April 18, 2005).[2]

Against this backdrop, plaintiffs and defendants both moved for summary judgment on issues arising from plaintiffs' priority list of August 16, 2004. "Summary judgment is the procedural vehicle by which most FOIA actions are resolved." *Jones-Edwards v. Appeal Bd. of the Nat'l Sec. Agency Cent. Sec. Agency*, 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005) (citing *Miscavige v. IRS*, 2 F.3d

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[2] The CIA informed plaintiffs on April 15, 2005 that all Office of Inspector General ("OIG") documents pertaining to ongoing investigations or law enforcement activities were exempt under FOIA. The CIA subsequently informed plaintiffs, in a letter dated July 15, 2005, that all responsive documents in the files of the OIG that no longer relate to pending investigations or law enforcement proceedings were also exempt under FOIA.

366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified.")).

This Opinion addresses five categories of issues that are disputed: (1) the DOD's withholding of reports and documents relating to the International Committee of the Red Cross; (2) documents relating to the DOD's interrogation activities; (3) the CIA's refusal to confirm or deny the existence or possession of certain documents; (4) the CIA's representation, with regard to documents relating to a request by former CIA Director Tenet to Secretary of Defense Rumsfeld that a certain Iraqi suspect be held at a high-level detention center and not be identified, that there are no meaningful, reasonably segregable portions of the documents that are not exempt from production; and (5) the DOD's withholding of photographs taken by Joseph Darby at Abu Ghraib prison and provided to the Army's Criminal Investigative Division. This written decision expands on, and supersedes, the rulings and observations that I made at the public and *in camera* oral arguments held on May 26, May 31, August 15, and August 30, 2005.

The Applicable Legal Principles

As the Second Circuit recently observed, "FOIA was enacted in order to 'promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed.'" *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005) (alteration in original) (quoting *Grand Cent. P'ship. Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999)). Clearly, however, the policy of open disclosure is not the only policy to consider. FOIA itself rec-

ognizes this, and provides nine exemptions against disclosure. It is the burden of the relevant agency to show that an adequate search was made, and that a "specific, enumerated exemption[] set forth in" FOIA authorizes it to withhold a document from production. *Id.*; *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *see also Tax Analysts v. IRS*, 410 F.3d 715, 719-20 (D.C. Cir. 2005) (reiterating that the requirement for granting summary judgment to an agency is that the "agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact"). The showing must meet an exacting standard, since, "[c]onsistent with FOIA's purposes, these statutory exemptions are narrowly construed." *Nat'l Council of La Raza*, 411 F.3d at 355-56 (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)).

My inquiry with respect to the documents in issue is particularly acute. Our nation has been at war with terrorists since their September 11, 2001 suicide crashes into the World Trade Center, the Pentagon, and a field in Shanksville, Pennsylvania, killing thousands and wounding our nation in ways that we still cannot fully recount—indeed, we were at war with terrorists since well before that event. American soldiers are fighting and dying daily in Afghanistan and Iraq. The morale of our nation is a vital concern and directly affects the welfare of our soldiers. How then to deal with the commands of FOIA and the strong policy it reflects "to promote honest and open government," "to assure the existence of an informed citizenry," and "to hold the governors accountable to the governed"? Of course, national security and the safety and integrity of our soldiers, military and intelligence operations are not to be com-

promised, but is our nation better preserved by trying to squelch relevant documents that otherwise would be produced for fear of retaliation by an enemy that needs no pretext to attack?

FOIA places a heavy responsibility on the judge to determine "*de novo*" if documents withheld by an agency are properly withheld under an exemption and, if necessary, to examine the withheld documents "*in camera*":

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

5 U.S.C. § 552(a)(4)(B); *see also Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) ("[I]t is precisely because FOIA's terms apply government-wide that we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*,

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).").

An agency's burden, although high, is not impractical. It suffices if the agency shows, by "[a]ffidavits or declarations supplying facts," that the agency has conducted a "thorough search" for responsive documents, and has given "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney*, 19 F.3d at 812; *see also Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973) (requiring as justification for claims of exemption "a relatively detailed analysis in manageable segments" and outlining guidelines for indexing). A district judge is required to give "*substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record." *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984). Once the agency has made a reasonable response, the burden on a FOIA plaintiff is high:

> In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.

Carney, 19 F.3d at 812 (citations omitted). The declarations submitted by the agency in support of its determination are "accorded a presumption of good faith." *Id.*

My duty as a judge is to apply the legal principles of the statute and cases discussed above.

1. *International Committee of the Red Cross Documents*

Plaintiffs demand production of all reports of the International Committee of the Red Cross ("ICRC") concerning the treatment of detainees in Iraq (Item 8 of the prioritized August 16, 2004 List); the government's responses to the ICRC's concerns (Item 13); a letter from military lawyers over the signature of Brig. Gen. Janis Karpinski to the ICRC responding to its concerns about conditions at Abu Ghraib (Item 49); and a complete set of documents reflecting discussions between the ICRC and military officers at Guantánamo Bay (Item 58).[3] Defendant DOD objected to production, arguing that responsive documents are exempted under FOIA Exemption 3, which provides that FOIA disclosure requirements do not apply to matters that are

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular

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[3] Plaintiffs also originally moved for summary judgment on Items 50 and 51. Defendant DOD claimed that there were no documents responsive to requests 50 (*Memorandum for MP and MI personnel* at Abu Ghraib from Col. Marc Warren, regarding a new plan to restrict Red Cross access to Abu Ghraib) and 51 (Memorandum from a top legal adviser to Lt. Gen. Ricardo S. Sanchez, to military intelligence and police personnel at Abu Ghraib, regarding a new plan to restrict Red Cross access to Abu Ghraib), except, potentially, a four-page memorandum, dated January 8, 2004, memorializing communications from the ICRC regarding a visit to Abu Ghraib, which DOD is withholding. Plaintiffs accordingly withdrew those two requests without prejudice to reasserting them at a later date.

> criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). The relevant statute, 10 U.S.C. § 130c, authorizes the withholding of "sensitive information" to the extent such withholding is requested by a foreign government or international organization. *See* 10 U.S.C. § 130c(a). Section 130c provides that if the information was "provided by, otherwise made available by, or produced in cooperation with" the foreign government or international organization, and certain other criteria are satisfied, the information may be exempted from release by the United States government. In particular, the national security official concerned must determine each of the following:

> (1) That the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government or international organization.
>
> (2) That the foreign government or international organization is withholding the information from public disclosure (relying for that determination on the written representation of the foreign government or international organization to that effect).
>
> (3) That any of the following conditions are met:
>
> > (A) The foreign government or international organization requests, in writing, that the information be withheld.
> >
> > (B) The information was provided or made available to the United States Government on the condition that it not be released to the public.

> (C) The information is an item of information, or is in a category of information, that the national security official concerned has specified in regulations prescribed under subsection [(g)] as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future.

Id. § 130c(b).

Under FOIA, "[t]he two threshold criteria needed to obtain exemption 3 exclusion from public disclosure are that (1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope." *A. Michael's Piano, Inc. v. Fed. Trade Comm'n*, 18 F.3d 138, 143 (2d Cir. 1994) (citing *CIA v. Sims*, 471 U.S. 159, 167 (1985)). Exemption 3, as the Second Circuit explained, "incorporates the policies of other statutes"; a statute that meets the requirements of Exemption 3 "may effectively exclude certain matters from disclosure, namely, as stated in exemption 3, those matters 'specifically exempted from disclosure by [the subject] statute.'" *Id.* (alteration in original) (quoting 5 U.S.C. § 552(b)(3)).

There is no dispute, except for one argument discussed below in this paragraph, that 10 U.S.C. § 130c qualifies as a withholding statute and that the ICRC qualifies as an appropriate international organization; the only question is whether the disputed materials fall within the statute's scope. *See id.* at 144 ("[W]e follow the approach taken by the Supreme Court in construing withholding statutes, looking to the plain language of the statute and its legislative history, in order to deter-

mine legislative purpose." (citing *Sims*, 471 U.S. at 168-73)). Plaintiffs' only argument that the statute does not apply is that no regulations have been promulgated to support the determination of the relevant national security official, the Secretary of Defense, that the release of the information would have "an adverse effect on the ability of the United States Government to obtain the same or similar information in the future." *See* 10 U.S.C. § 130c(b)(3)(C), (g), (h)(l)(A). However, the text of the relevant portion of the statute is in the disjunctive; the statute does not provide that the promulgation of regulations is a necessary precondition to the statute's effectiveness. Furthermore, a directive of Secretary Donald Rumsfeld requires confidential treatment of all ICRC communications. *See* Decl. of Charles A. Allen, Deputy Gen. Counsel (Internat'l Affairs), Office of Gen. Counsel, DOD, dated Mar. 25, 2005, ¶ 13 & Ex. B (describing and attaching Memo, Sec'y of Def., July 14, 2004). Accordingly, plaintiffs' argument is without merit. I hold that 10 U.S.C. § 130c constitutes a withholding statute for the purposes of FOIA Exemption 3. I therefore turn to examine if the documents responsive to Items 8, 13, 49, and 58 fall within the scope of 10 U.S.C. § 130c.

Item 8 requests the reports delivered by the ICRC to DOD. Such reports clearly fall within the scope of 10 U.S.C. § 130c and accordingly, they are covered by FOIA Exemption 3. At oral argument, plaintiffs conceded that the ICRC reports were properly exempted under the statute, and I so ruled. Tr. of May 31, 2005, at 12.

The government argues that Items 13, 49, and 58 reflect a dialogue between DOD and the ICRC, and thus

were produced "in cooperation with" the ICRC, and are properly exempted under 10 U.S.C. § 130c(b)(l). Plaintiffs disagree with this characterization and argue, in addition, that with respect to at least some documents, extensive discussions in the press constitute a waiver of confidentiality.

The ICRC represented that it maintained, and requested that the United States government likewise maintain, confidentiality with respect to the disputed information, *see* Letter from Finn Ruda, Deputy Head of ICRC's Delegation for United States and Canada to Stewart F. Aly, Assoc. Deputy Gen. Counsel, DOD, confirming "that all records of communications from the ICRC or its representatives regarding detainees in Guantánamo and Iraq have been provided by the ICRC to the DOD on condition that the documents not be released to the public." Second Decl. of Stewart F. Aly, dated Mar. 23, 2005, Ex. D (attaching letter) [hereinafter Second Aly Decl.]. The Finn letter also states that "the ICRC itself is withholding such documents from public disclosure." *Id.* The requirements of § 130c(b)(2) and (b)(3) are thus satisfied.

As to the government's first argument, that the contested information was "provided by, otherwise made available by, or produced in cooperation with" the ICRC, *see* 10 U.S.C. § 130c(b)(l), I examined a sample of the documents *ex parte* and *in camera*. The government provided a binder of samples—tabs A, B, C, and D, pertaining, respectively, to Items 8, 13, 49, and 58. Tab B[4] provided a sample of four out of twenty-two responsive documents; Tab C contained the one responsive docu-

[4] Tab A pertained to Item 8, which was no longer contested; I examined the documents provided under Tabs B, C, and D.

ment identified by DOD; and Tab D provided a sample of three of thirty-eight documents.

The documents sampled essentially contained responses by DOD to the observations reported by the ICRC, thereby exposing the information "provided by" the ICRC. Just as an attorney's responses to a client's requests for advice are privileged—*see, e.g.*, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (noting that "[w]hile its purpose is to protect a client's disclosures to an attorney, the federal courts extend the privilege also to an attorney's written communications to a client"); *In the Matter of Fischel*, 557 F.2d 209, 211 (9th Cir. 1977) ("Ordinarily the compelled disclosure of an attorney's communications or advice to the client will effectively reveal the substance of the client's confidential communication to the attorney. To prevent this result, the privilege normally extends both to the substance of the client's communication as well as the attorney's advice in response thereto."); *see also* 8 J. Wigmore, Evidence § 2320 at 628-29 (McNaughton rev. 1961) (describing that one reason for privileging an attorney's communications to a client is that disclosure could "lead[] to inferences of the tenor of the client's communications"); 1 McCormick on Evidence § 89 at 326 (John W. Strong ed., 4th ed. 1992) ("[I]t is generally held that the privilege will protect at least those attorney to client communications which would have a tendency to reveal the confidences of the client.")—so the DOD's responses to the ICRC are exempt, for otherwise the ICRC's request for confidentiality would be compromised.

Specifically, I ruled as follows, after *in camera* inspection of the sample of documents provided by the

government: with respect to Tab B documents, responses to concerns raised by the ICRC regarding the treatment of detainees (Item 13), I ruled that the documents, if produced, would disclose information reported by the ICRC to DOD, and were therefore exempt and that no segregable portion could meaningfully be produced following redaction. *See* 5 U.S.C. § 552(b). With respect to Item 49, a letter from military lawyers over the signature of Brig. Gen. Janis Karpinski to the ICRC responding to its concerns about conditions at Abu Ghraib, I ruled that the single document could be redacted, and thus the portions not covered by 10 U.S.C. § 130c must be disclosed. With respect to Item 58, a complete set of documents reflecting discussions between the ICRC and military officers at Guantánamo Bay, the documents had already been produced in redacted form. I ruled that the redactions had been made appropriately, and thus that the government had satisfied its burden.

I accepted over plaintiffs' challenge the government's representation that the samples it provided were fairly representative, and I ruled that the principles reflected in my rulings be applied by the government to all other documents in these categories that were responsive to plaintiffs' requests.

II. *DOD Interrogation Activities*

Plaintiffs seek summary judgment to obtain DOD's responses to requests for: an interim policy put into effect by Lt. Gen. Ricardo Sanchez based on the Guantánamo Bay policy set forth in Gen. Miller's report (Item 4); documents showing that Lt. Gen. Sanchez approved the use of high-pressure interrogation techniques by senior officials at Abu Ghraib without requiring them to obtain

prior approval from outside the prison (Item 37); a memorandum from the Combined Joint Task Force (CJTF-7) regarding the applicability of Army Field Manual 34-52 and sensory deprivation (Item 39); a document regarding "Interrogation and Counter-Resistance Policy" listing interrogation tactics approved by CJTF-7 (Item 40); a directive of Lt. Gen. Sanchez entitled "Interrogation and Counter-Resistance Policy" (Item 41); and a memorandum from CJTF-7 on interrogations (Item 42).

Defendant DOD represented that it possessed only two responsive documents, both of which had been declassified, and that the two had already been turned over to plaintiffs. Defs.' Br., at 8 (citing Second Aly Decl., ¶¶ 23-26 & Exs. E, F). In response to plaintiffs' challenge, DOD identified drafts of the two disclosed memoranda, Third Decl. of Stewart F. Aly, dated May 19, 2005, ¶¶ 3-9, and, although offering to process the drafts, advised that they probably would be withheld under FOIA Exemption 5, since they constituted the agency's deliberative processes. *See* 5 U.S.C. § 552(b)(5) (providing exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"). I ruled that the government's representation as to the completeness of its production had to be accepted, and that the government should complete its processing of the drafts by June 21, 2005, with leave to plaintiffs to raise objections to exemptions claimed by the government.[5]

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[5] Since the parties have not advised me of any continuing issues, I consider this phase of the proceedings closed.

III. *CIA's Glomar Responses*

The third dispute concerns a response by the CIA, neither confirming nor denying that it possesses documents responsive to three of plaintiffs' requests. Plaintiffs' first request is for a memorandum from the Department of Justice ("DOJ") to the CIA interpreting the Convention Against Torture (Item 1). Plaintiffs, referring to leaks about the document in the press, comment that the documents may have expressed opinions on certain interrogation techniques, such as "sleep deprivation," the "use of phobias," and the "deployment of 'stress factors,'" distinguishing such techniques from those "causing severe physical or mental pain." Plaintiffs' second request is for a DOJ memorandum specifying interrogation methods that the CIA may use against top Al-Qaeda members (Item 29), which, according to plaintiffs, may permit a technique known as "waterboarding" whereby a detainee believes he is drowning. Plaintiffs' third request is for a directive signed by President Bush granting the CIA the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against detainees (Item 61).

The CIA, responding to these three categories of requests, gave a "Glomar response," neither admitting nor denying the existence of these documents in its possession, and claiming that the very fact of the existence or non-existence of the documents must be withheld.[6]

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[6] In response to my question at oral argument about whether a DOJ memorandum could instead be requested, and even possibly be obtained, from the Department of Justice, the government represented that "agencies with the equities in the existence or nonexistence of

The CIA represents that it cannot admit or deny that it possesses documents relating to these categories without revealing "intelligence activities" or "methods," and that it must therefore give a Glomar response.

(a) *The Dorn Declarations*

The CIA Information Review Officer, Marilyn A. Dorn, states in her declaration:

> CIA confirmation of the existence of the records requested in item nos. 1, 29, and 61 would confirm a CIA interest in or use of specific intelligence methods and activities. Similarly, a CIA response that it had no records responsive to those items would suggest that the CIA was not authorized to use or was not interested in using these intelligence methods and activities. Either response would provide foreign intelligence agencies and other groups hostile to the United States with information about CIA's intelligence activities and methods.

See Fourth Decl. of Marilyn A. Dorn, dated Mar. 30, 2005, ¶ 13 [hereinafter Fourth Dorn Decl.].

Ms. Dorn claims that records responsive to the three items requested cannot be identified as either existing, or not existing, without compromising national security. If the CIA were to state that the documents existed, the CIA would be admitting that it "had engaged in clandestine intelligence activities *or* had an interest in pursuing clandestine intelligence activities upon which DOJ allegedly advised or which were allegedly included in the 'Presidential Directive,'" and would also "acknowledge

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documents tend to be the ones responding. So . . . it is appropriate that the CIA is litigating this issue." *See* Tr. of May 31, 2005, at 63.

a CIA capability to pursue such intelligence activities and employ such methods," because the "CIA would not request legal memoranda from DOJ or authorizations from the President for intelligence activities in which it had no interest." *Id.* ¶¶ 10-11. If, on the other hand, it were to deny the existence of the documents, its denial "would acknowledge a lack of CIA interest or capability." *Id.* ¶ 11. Hence, it can neither admit nor deny.

Ms. Dorn states that the "mere confirmation or denial of the existence or non-existence of [such] documents . . . reasonably could be expected to cause serious damage to the national security," *id.* ¶ 16, because it would "interfere with the United States Government's collection of intelligence in the war on terrorism," *id.* ¶ 12, and be of "material assistance" to those who would disrupt our intelligence operations, *id.* ¶ 14. Ms. Dorn states also that confirmation or denial of the existence of the requested documents could bear on the foreign relations of the United States, since countries that cooperate with us "may be less willing to cooperate if the U.S. Government were to officially acknowledge CIA current or past clandestine intelligence activities and methods, or intelligence interests." *Id.* ¶ 15.

Following oral argument in May, the CIA submitted a Fifth Declaration of Marilyn A. Dorn, dated July 15, 2005 [hereinafter Fifth Dorn Decl.], a classified document, which supplements the agency's justifications for its Glomar responses. I have reviewed the Fifth Dorn Declaration *in camera* and *ex parte*. This Opinion discloses no fact or argument that is not part of the public record.

The CIA justifies its Glomar response, neither admitting nor denying the existence of three categories of

documents responsive to plaintiffs' demands, on the basis of Exemptions 1 and 3 to FOIA. I discuss each of these exemptions in turn.

(b) *Exemption 1*

Exemption 1 exempts matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 12958, effective as amended March 25, 2003, provides for classification of national security information. Exec. Order No. 12958, *reprinted as amended* by E.O. 13292 in 50 U.S.C. § 435 [hereinafter E.O. 12958]; *see also* Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). Pursuant to E.O. 12958, an agency may classify information within specified categories if the appropriate classification authority [7] "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security":

> Sec. 1.1. Classification Standards. (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:
>
> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;

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[7] Ms. Dorn has the requisite classification authority. *See* E.O. 12958 §§ 1.1(a), 1.3.

> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

E.O. 12958 § 1.1(a). Permissible categories of information that may be classified include information concerning: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology; and (d) foreign relations or foreign activities of the United States, including confidential sources. *Id.* § 1.4. Information may not be classified to "conceal violations of law," to "prevent embarrassment," or to prevent or delay release of information "that does not require protection":

> Sec. 1.7. Classification Prohibitions and Limitations.
>
> (a) In no case shall information be classified in order to:
>
> (1) conceal violations of law, inefficiency, or administrative error;
>
> (2) prevent embarrassment to a person, organization, or agency;
>
> (3) restrain competition; or

> (4) prevent or delay the release of information that does not require protection in the interest of the national security.

Id. § 1.7(a). The Executive Order also provides for a Glomar response; in response to a FOIA request, "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." *Id.* § 3.6(a).

(c) *Exemption 3*

The CIA also justifies its Glomar responses under Exemption 3, which exempts matters "specifically exempted from disclosure by statute . . . (A) requir[ing] that the matters be withheld from the public in such a manner as to leave no discretion . . . , or (B) establish[ing] particular criteria for withholding or refer[ring] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The framework for analyzing agency withholdings under Exemption 3 was outlined earlier in connection with the ICRC documents. *See A. Michael's Piano, Inc. v. Fed. Trade Comm'n*, 18 F.3d 138, 143 (2d Cir. 1994) (requiring the government to show that "(1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope").

The qualifying statute here is Section 103(c)(7) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-3(c)(7) (West 2003), which commands the Director of Central Intelligence ("DCI") to "protect intelligence

sources and methods from unauthorized disclosure."[8] *See CIA v. Sims*, 471 U.S. 159, 167-68 (1985); *Assassination Archives and Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003). The CIA contends that a substantive answer to plaintiffs' requests can "reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Wolf v. CIA*, 357 F. Supp. 2d 112, 117 (D.D.C. 2004) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)).

The Supreme Court in *Sims*, analyzing the "intelligence sources and methods" language of the statute, held that its "broad sweep" "comport[ed] with the nature of the Agency's unique responsibilities." 471 U.S. at 169 (construing an earlier version of the statute authorizing the DCI to protect "intelligence sources and methods"). The Supreme Court ruled that "the plain meaning of the statutory language, as well as the legislative history of the National Security Act . . . indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of in-

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[8] The recently enacted Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004) (except as otherwise expressly stated, effective not later than six months after enactment, as provided by section 1097 of such Act), amends the National Security Act. For example, section 1011(a) of the 2004 Act, 50 U.S.C.A. § 403-1(i)(1), provides that the "Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." The government argues, however, that the withholding statute in effect at the time of plaintiffs' requests governs the requests. Plaintiffs have not challenged this position. I agree with the government, *see Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983) ("To invoke Exemption 3, an agency must demonstrate that . . . a statute exists and was in effect at the time of the request. . . ."), and apply the withholding statute in effect at the time of plaintiffs' requests.

telligence information from disclosure," and that the DCI, not the judiciary, has the responsibility to weigh the factors and decide if disclosure "may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Id.* at 168-69, 180; *see also Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) ("The assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not to the courts." (citing *Sims*)).

(d) *Analysis*

The Glomar response, by which the agency neither admits nor denies that it possesses a requested document, traces its roots to *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) [hereinafter *Phillippi I*]. That case involved the Glomar Explorer, a large ship ostensibly designed for oceanic research. The ship was recorded as owned by the Summa Corporation, a corporation owned or controlled by Howard Hughes. However, according to accounts appearing in the media, the real owner and operator was the CIA. A controversy arose concerning whether the CIA—before the news stories appeared—had attempted to persuade the media not to publish these accounts. The plaintiff, Phillippi, a journalist, filed suit under FOIA to uncover such contacts between the CIA and the news media, demanding production of:

> all records relating to the Director's or any other agency personnel's attempts to persuade any media personnel not to broadcast, write, publish, or in any other way make public the events relating to the activities of the Glomar Explorer, including, but not limited to, files, documents, letters, [etc.].

Id. at 1011 n.1. The CIA, asserting that the "existence or nonexistence of the requested records was itself a classified fact exempt from disclosure under Sections (b)(l) and (3) of FOIA," *id.* at 1012, determined that "in the interest of national security, involvement by the U.S. Government in the activities which are the subject matter of [Phillippi's] request can neither be confirmed nor denied." *Id.* The CIA was concerned that admission or denial of contacts with the press would amount to admission or denial of its involvement with the Glomar Explorer project and would thereby compromise "intelligence sources and methods" in violation of section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3) (1970), and "severely damage the foreign relations and the national defense of the United States." *Id.* at 1011, 1013-14 (Aff. of Brent Scowcroft, Ass't to Pres. for Nat'l Sec. Affairs). As the Court of Appeals described the Issue:

> In effect, the situation is as if appellant had requested and been refused permission to see a document which says either "Yes, we have records related to contacts with the media concerning the Glomar Explorer" or "No, we do not have any such records."

Id. at 1012. The Court of Appeals remanded to require the CIA to "submit a public justification, which is as detailed as is possible, for refusing to confirm or deny the existence of the requested records." *Id.* at 1015 n.12. The Court of Appeals held that the district court should discharge its *de novo* review obligation by first creating "as complete a public record as is possible," and only then, if necessary, by "examin[ing] classified affidavits *in camera* and without participation by plaintiff's counsel." *Id.* at 1013.

Later cases, relying on *Phillippi I*, have approved Glomar responses where substantive responses, either admitting or denying that particular documents existed, "would remove any 'lingering doubts' that a foreign intelligence service might have on the subject, and [where] the perpetuation of such doubts may be an important means of protecting national security." *Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (citing *Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981)); *see also Hunt v. CIA*, 981 F.2d 1116, 1118 (9th Cir. 1992).

The danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods. That over-classification was evident in *Phillippi*, after administrations changed and "the government acknowledged both that the CIA was responsible for the [Glomar Explorer] project" and that "CIA officials had tried to dissuade members of the press from publishing stories about it." *Phillippi v. CIA*, 655 F.2d 1325, 1328 (D.C. Cir. 1981) [hereinafter *Phillippi II*]. Yet, even then, the CIA was allowed to redact records to withhold descriptions of conversations between the CIA and the press. The district court rejected plaintiff's arguments that since the world already knew, possibly from the CIA's own disclosures, that the real purpose of the Glomar Explorer apparently extended beyond oceanic research to raising a lost Russian submarine from the ocean floor, there could be no remaining statutory purpose to withhold descriptions of contacts with the press. The Court of Appeals upheld the district court's deference to the CIA, holding that courts lacked compe-

tence to decide such delicate questions affecting national security and should defer to "well-documented and specific affidavits of the CIA." *Id.* at 1330.

> In sum, the line between what may be revealed and what must be concealed is itself capable of conveying information to foreign intelligence agencies. For this reason, this court cannot simply assume, over the well-documented and specific affidavits of the CIA to the contrary, that revelation of seemingly innocent information which might nonetheless jeopardize a fallback cover story is required under the FOIA, either because the information in question has already been made public, or even, as in the present case, because it was disseminated for confidential purposes by the CIA itself. Without the ability to engineer controlled leaks of disinformation, the CIA would be deprived of the ability to disseminate a fallback cover while simultaneously protecting it.

Id. The Court of Appeals also accepted that there was a national interest in keeping foreign analysts in the dark, and leaving them unsure if that which was publicly disclosed was all that was secretly known. As the Court of Appeals put it:

> FOIA does not require the CIA to lighten the task of our adversaries around the world by providing them with documentary assistance from which to piece together the truth.

Id. at 1332. And, further, even if the only question was whether to recognize officially that which was informally or unofficially believed to exist, the niceties of international diplomacy sometimes make it important not to embarrass a foreign country or its leaders, and exemp-

tions from FOIA protect that concern as well. *Id.* at 1332-33.

Historians will evaluate, and legislators debate, how wise it is for a society to give such regard to secrecy. The practice of secrecy, to compartmentalize knowledge to those having a clear need to know, makes it difficult to hold executives accountable and compromises the basics of a free and open democratic society. It also creates a dangerous tendency to withhold information from those outside the insular group, for fear of compromising the sources and integrity of intelligence. The consequences can be dire for, as noted in the 9/11 Commission Report, the strict need-to-know, proprietary approach to intelligence that has been employed by government agencies prevents the effective use of our vast storehouse of information. 9/11 Comm'n Rep. (2004), § 13.3, at 416-17 ("The biggest impediment to all-source analysis—to a greater likelihood of connecting the dots—is the human or systemic resistance to sharing information."). Identities of terrorists may be locked in the files of one agency and not given to another, or reported, if at all, only at the very top of chains of command, denying real-time need to know by those at operating points. The insularity of information tends to cause a multiplicity of intelligence-gathering agencies, each zealously protecting its own private sources in competition with other agencies. *See, e.g.*, Judith Miller, *A New York Cop in Israel, Stepping a Bit on F.B.I. Toes*, N.Y. Times, May 15, 2005, § 1, at 37 (discussing tensions between the New York Police Department and the FBI arising from their separate intelligence-gathering endeavors abroad, in turn resulting from the NYPD's desire to have quick

access, on an equal footing with federal agencies, to key counter-terrorism information).

There was no more cogent critic of the penchant by government officials to over-classify information than the late Senator Daniel Patrick Moynihan, and few with his competence and experience. Senator Moynihan, reflecting on his experiences as Chairman of the Commission on Protecting and Reducing Government Secrecy, among many other relevant positions, commented at the conclusion of his book, *Secrecy*:

> [A] huge proportion of the government's effort at classifying is futile anyway. Let [George F.] Kennan have the last word. In a letter of March 1997 he writes: "It is my conviction, based on some 70 years of experience, first as a government official and then in the past 45 years as an historian, that the need by our government for *secret* intelligence about affairs elsewhere in the world has been vastly overrated." . . .
>
> A case can be made . . . that secrecy is for losers. For people who don't know how important information really is. The Soviet Union realized this too late. Openness is now a singular, and singularly American, advantage. We put it in peril by poking along in the mode of an age now past. It is time to dismantle government secrecy, this most pervasive of Cold War-era regulations. It is time to begin building the supports for the era of openness that is already upon us.

Daniel Patrick Moynihan, *Secrecy*, 226-27 (Yale Univ. Press 1998); *see generally* Rep. of the Comm'n on Protecting and Reducing Gov't Secrecy (1997).

This is not to say that there is no room for secrets, or that the courts have the competence or the expertise of national security experts. Indeed, the courts generally respect the CIA's right to make a Glomar response. *See Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004) ("Every appellate court to address the issue has held that the FOIA permits the CIA to make a 'Glomar response' when it fears that inferences from *Vaughn* indexes or selective disclosure could reveal classified sources or methods of obtaining foreign intelligence."). Most such cases involve requests by persons who claim to have had employment or other personal connections to the agency, or who seek such information about others who may have had such relationships. By giving a Glomar response, the CIA is able to avoid identifying its employees, or targets, and their activities. *See, e.g., id.* at 245 (Glomar response necessary to avoid "reveal[ing] details about intelligence-gathering methods"); *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) (Glomar response necessary to avoid acknowledgment of employment); *Minier v. CIA*, 88 F.3d 796, 801-02 (9th Cir. 1996) (Glomar response necessary to avoid revealing if person was a CIA agent); *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992) ("[D]isclosure of the existence or non-existence of records pertaining to Eslaminia," an Iranian national allegedly murdered by Hunt, "is tantamount to a disclosure whether or not he was a CIA source or intelligence target.").

Other cases defer to the CIA's unwillingness to describe its intelligence-gathering activities. *See, e.g., Miller v. Casey*, 730 F.2d 773, 774 (D.C. Cir. 1984) (upholding Glomar response to request for "information concerning alleged efforts by the United States and other countries to infiltrate intelligence agents and poten-

tial guerrillas into Albania during the period 1945-53"); *Gardels v. CIA*, 689 F.2d 1100, 1102-03 (D.C. Cir. 1982) (upholding Glomar response to request by a student at the University of California for "documents revealing covert CIA connections with or interest in the University"); *Wolf v. CIA*, 357 F. Supp. 2d 112, 114 (D.D.C. 2004) (upholding Glomar response to request by a researcher for records concerning Jorge Elicier Gaitan, a former Colombian presidential candidate who was assassinated in 1948); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 625 (S.D.N.Y. 1996) (upholding Glomar response to request for communications between the CIA station in the Dominican Republic and CIA headquarters "pertaining to contacts with dissident elements, hostile to the regime of Rafael Trujillo").

In the present case, the CIA justifies its Glomar responses, in its publicly filed documents, by referencing the same types of concerns as those found in the cases. Ms. Dorn states that the "CIA would not request legal memoranda from DOJ or authorizations from the President for intelligence activities in which it had no interest"; that "[m]erely acknowledging that the CIA sought legal opinions or authorizations addressing specific interrogation and detention activities is itself classified because the answer provides information about the types of intelligence methods and activities that are available to the CIA or may be of interest to the CIA"; and that "[r]evealing that information reasonably could be expected to interfere with the United States Government's collection of intelligence in the war on terrorism." Fourth Dorn Decl. ¶¶ 11-12. Further, Ms. Dorn states that our foreign relations could be compromised because hitherto cooperating countries "may be less willing to cooperate if the U.S. Government were to offi-

cially acknowledge CIA current or past clandestine intelligence activities and methods, or intelligence interests." *Id.* ¶ 15. In the Fifth Dorn Declaration, a classified document submitted to me *in camera*, Ms. Dorn provides further elaboration and describes particularized harms to justify the agency's Glomar responses.

In *Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984), the Court of Appeals upheld a Glomar response under Exemptions 1 and 3 upon descriptions of specific probable harms that might flow from substantive admissions or denials. The request in *Miller* was for:

> All information on attempts by the U.S., U.K., and other western countries to infiltrate intelligence agents and potential guerrillas into Albania during the period between the end of World War II and the death of Stalin in 1953, including but not limited to those operations apparently betrayed to the Russians by Kim Philby.

Id. at 774. In response, the Information Review Officer for the Directorate of Operations of the CIA (the same position held by Ms. Dorn), described why national security and the United States' foreign relations would be compromised by a substantive disclosure:

> 1) disclosure now might prevent foreign countries from participating in future covert missions, 2) disclosure might hamper future relations with Albania, 3) a pattern of denials or affirmances would permit hostile nations to piece together a "catalog" of U.S. covert missions, 4) denial or affirmance would enable the Soviet Union to ascertain the reliability of its double agent, Kim Philby, 5) acknowledgement could jeopardize sources and sympathizers still with-

> in Albania, 6) acknowledgement could hamper future recruitment of sources, and 7) acknowledgement would reveal the particular intelligence method—infiltration of agents—allegedly used in the mission.

Id. at 775-76.

The Information Review Officer showed also how acknowledging the existence of the Albanian program would reveal "intelligence sources or methods" in three possible ways, thereby compromising them: "by providing the critical confirmation which would allow Albanian leaders to identify participants in the covert action; by damaging future CIA efforts to recruit sources; and by revealing how, where and when the CIA has deployed its resources." *Id.* at 777-78. Upon these particularized justifications, the Court of Appeals upheld the CIA's Glomar response under Exemptions 1 and 3 to FOIA.

Courts interpret FOIA to afford agency affidavits "a presumption of good faith" and award agencies "summary judgment on the basis of affidavits" that are "adequate on their face." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *see also Miller*, 730 F.2d at 776 ("[T]he district court must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record." (quotations omitted)). Clearly, the need for such deference is particularly acute in the area of national security. The statutory text of FOIA, however, requires the court to "determine the matter *de novo*," 5 U.S.C. § 552(a)(4)(B), for "[i]n no case" is classification to conceal "violations of law" or "inefficiency, or administrative error," or to mask "embarrassment." *See* E.O. 12958 § 1.7; *see also Phillippi I*, 546 F.2d at 1013-15 & n.12. Largely, the courts fail to grapple with this tension, ruling instead

that the administrative assertions of secrecy should be accepted without much, if any, *de novo* review.

In the case before me, Item 29, a DOJ memorandum specifying interrogation methods that the CIA may use against top Al-Qaeda members, and Item 61, a directive signed by President Bush granting the CIA the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against detainees, specifically refer to "interrogation methods" alleged to be considered, and perhaps used, by the CIA in connection with detainees in United States' custody. The discussions of these documents in the public press, undoubtedly arising from numerous leaks of the documents, raise concern, however, that the purpose of the CIA's Glomar responses is less to protect intelligence activities, sources or methods than to conceal possible "violations of law" in the treatment of prisoners, or "inefficiency" or "embarrassment" of the CIA. *Compare* 50 U.S.C.A. § 403-3(c)(7) (West 2003) (protecting intelligence sources and methods), *and* E.O. 12958 § 1.4 (same; permissible subjects of classification), *with* E.O. 12958 § 1.7 (criteria that forbid classification). The Dorn Declarations amply discuss the need to protect "intelligence sources and methods." But they do not describe the intelligence sources or methods themselves, or reflect any discussion within the administration whether the particular methods might constitute a "violation[] of law," or an "embarrassment," or administrative "inefficiency" or "error," when debate on these points within the administration probably occurred, as suggested by the discussions in the press. *See* E.O. 12958 § 1.7. And since the existence of the documents that plaintiffs request, which give rise to all this controversy, is neither admitted nor denied, there is nothing to show

the court that might allow me to arrive at my own conclusions. In short, I am not given enough relevant information to make the *de novo* determinations that FOIA would seem to require. *See* 5 U.S.C. § 552(a)(4)(B).

Nevertheless, under the cases and notwithstanding FOIA's clear statutory command, there is small scope for judicial evaluation in this area. *See, e.g., Phillippi II*, 655 F.2d 1325. The Fifth Dorn Declaration sets out that which the cases require. *See Miller*, 730 F.2d 773. The agency's arguments that it should not be required officially to acknowledge the precise "intelligence activities" or "methods" it employs or considers—for example, whether it has any role whatsoever in the interrogation of detainees—are given deference by the courts, for the CIA, not the courts, is deemed to have the competence to "weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Sims*, 471 U.S. at 180; *see also Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving the district court's performance of "its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"). On the basis of the Fourth and, in particular, the Fifth Dorn Declarations, I accept the CIA's Glomar response with respect to Items 29 and 61 of the August 16, 2004 List.

Item 1, however, a "[m]emorandum from DOJ to CIA interpreting the Convention Against Torture," does not, by its terms, implicate "intelligence sources or methods." The CIA's Glomar response to that item focuses, not on plaintiffs' demand, but on plaintiffs' effort to explain to the government why, because of frequent refer-

ences in the public press, it should not be difficult for the government to process its response. Thus, plaintiffs referred to news reports of interrogation techniques that may have been justified in the memorandum, such as "sleep deprivation," the "use of phobias," and the "deployment of 'stress factors,'" distinguishing such practices from those that cause "severe physical or mental pain" characteristic of torture. The CIA justifies its Glomar response not on the text of the demand, but on all those references, as if they were part of the demand itself. *See* Fourth Dorn Decl., at 5 n.4. In effect, the agency seeks to use plaintiffs' attempt to provide assistance to the government in identifying the memorandum as a basis for withholding information about the item requested. But plaintiffs' speculation as to the possible contents of the memorandum is not controlling; rather, it is the unembellished request set forth in the August 16, 2004 List (set out in the "Description of Record" column) that controls. The List was created for the benefit of defendant agencies, and they must be bound by it. *See Miller*, 730 F.2d at 777 (The "agency [i]s bound to read [the request] as drafted, not as either agency officials or [the requester] might wish it was drafted."). I rule, therefore, that acknowledging whether or not the memorandum requested by plaintiffs exists reveals nothing about the agency's practices or concerns or its "intelligence sources or methods." Available exemptions can be proved if necessary to avoid compromise, if any, to the interest of national defense or foreign policy. Since the government has failed in its burden to justify its Glomar response, *see* 5 U.S.C. § 552(a)(4)(B); *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999); *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994), the government

shall produce the documents relating to Item 1, or prove that the same are exempt from production.

IV. *CIA Request to DOD to Detain an Iraqi Suspect Without Identifying the Suspect*

The fourth set of issues involves seventy-one documents responsive to Item 43 of the August 16, 2004 List, a request by former CIA Director Tenet to Defense Secretary Rumsfeld that the DOD hold an Iraqi suspect at a high-level detention center, but that he not be listed on the prison rolls, and an order by Secretary Rumsfeld implementing the request. The CIA, responding on behalf of the government,[9] withheld the documents under Exemptions 1, 2,[10] 3, 5 and 7(A).[11] In particular, with respect to Exemption 1, the CIA relied upon Executive Order 12958, which governs the classification of national security information. With respect to Exemption 3, the CIA relied upon the National Security Act, 50 U.S.C.A. § 403-3(c)(7) (West 2003), and Section 6 of the Central Intelligence Agency Act of 1949, *as amended*,

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[9] Perhaps as the agency with the greatest "equity" in the documents. *See* note 6, *supra*.

[10] Exemption 2 exempts from FOIA matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2).

[11] Exemption 7(A) exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

50 U.S.C.A. § 403g (West Supp. 2003), as the statutes furnishing the requisite authority to withhold.[12]

The CIA supported its position by providing a *Vaughn* index of 126 pages, describing each document by its length and general subject matter, but not as to its specific content. *See* Fourth Dorn Decl., Ex. A. At the end of each description, Ms. Dorn represented that "There is no meaningful, reasonably segregable portion of the document that can be released."

Plaintiffs challenge whether, indeed, there are no "meaningful, reasonably segregable" portions of the documents. If there are, those portions must be produced. *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."). Plaintiffs asked the court to review *in camera* each of the seventy-one responsive documents. Plaintiffs do not press their challenge to Ms. Dorn's showing that the documents overall are exempt from production.

An agency seeking to withhold material may satisfy its burden under FOIA by affidavits evincing a thorough search and providing reasonably detailed explanations for the withholding. *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Cases generally disfavor *in camera* inspections by district court judges as the primary method for resolving FOIA disputes. *See, e.g., NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978) ("The *in camera* review provision is discretionary by its terms,

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[12] Exemptions 1 and 3, and their implementing regulations and statutes, were discussed in the previous section of this Opinion, in connection with the CIA's Glomar response.

and is designed to be invoked when the issue before the District Court could not be otherwise resolved; it thus does not mandate that the documents be individually examined in every case."); *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999) ("When a government agent can attest in a sworn affidavit that the redactions are necessary, and elaborate on the reasons for the redactions with sufficient specificity, the district court should be able to rule on the appropriateness of the redactions without conducting an *in camera* review of the redacted materials."); *PHE, Inc. v. DOJ*, 983 F.2d 248, 253 (D.C. Cir. 1993) (noting that in FOIA cases "*in camera* review is generally disfavored").

However, when a court is not able to resolve to its own satisfaction an agency's determination to withhold documents, it may require a further showing by the agency and, if necessary, it may conduct an *in camera* review. *See Halpern*, 181 F.3d at 295 (ruling that, on remand, "the district court may, in its discretion, order *in camera* review of the unredacted documents themselves," and remarking that *[i]n camera* review is considered the exception, not the rule, and the propriety of such review is a matter entrusted to the district court's discretion" (quoting *Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988))).

Ms. Dorn's Fourth Declaration describes the nature of each of the seventy-one documents, and the procedures by which she determined non-segregability with respect to each document. Fourth Dorn Decl. ¶ 22, Ms. Dorn's statement that a "line-by-line review was conducted for all the documents, individually and as [a] whole" is undocumented, and her statement that "there are no meaningful, reasonably segregable, non-

exempt portions" of the seventy-one documents is conclusory, for she does not describe the individual documents paragraph by paragraph and line by line. *Id.* FOIA provides that the district judge has the responsibility, ultimately, to make the determination, 5 U.S.C. § 552(a)(4)(B), and I determined that there was no feasible way for me to evaluate the conclusory determination of lack of segregability at the end of each of Ms. Dorn's document descriptions without viewing at least a sample of the documents *in camera*.

I ordered the plaintiffs to select a sample size of fifteen documents, that is, about 20% of the total set of seventy-one responsive documents, and the government to re-review those fifteen to confirm that there are no segregable portions that may be released, subject to my review. Plaintiffs identified the fifteen documents to be reviewed, numbered according to the numbering scheme provided in Ms. Dorn's Fourth Declaration—13, 39, 263, 269, 273, 279, 291, 304, 335, 337, 346, 402, 428, 429, and 431—and the government re-reviewed them, and confirmed its position as to non-segregability.

Following this confirmation by the government, the CIA, in further support of its position, provided two classified declarations, Decl. of Porter J. Goss, Dir., CIA, dated Aug. 3, 2005; Sixth Decl. of Marilyn A. Dorn, dated Aug. 5, 2005, which I reviewed *in camera*. The Sixth Dorn Declaration furnishes a further explanation of the agency's determination of non-segregability, and attaches an eighty-eight page *Vaughn* index addressing solely the fifteen documents identified by plaintiffs. The agency argues that the Sixth Dorn Declaration and *Vaughn* index should avert the need for an *in camera* review of the fifteen documents themselves, but, to the

extent I determine otherwise, the agency is prepared to provide minimally redacted versions of the documents. The Declaration of CIA Director Goss describes the information that is redacted.

I have reviewed the Goss Declaration and the Sixth Dorn Declaration. The explanations provided therein more substantially support the agency's position. In particular, the *Vaughn* index attached to the Sixth Dorn Declaration conveys a better sense of the nature and contents of the sample fifteen documents identified by plaintiffs. Accordingly, I am now satisfied that there is no meaningful, reasonably segregable, non-exempt portion of the seventy-one documents that can be produced. *See Halpern*, 181 F.3d at 294 ("What a district court needs from the government, in a *Vaughn* affidavit, is information that is . . . specific enough to obviate the need for an *in camera* review. . . ."). Since plaintiffs' objection was restricted to the issue of segregability, and since plaintiffs have not objected to my tentative ruling that the Goss Declaration and Sixth Dorn Declaration sufficed, I now consider the fourth dispute to be closed and grant summary judgment to the government.

V. *The Darby and Related Photographs of Abuse of Detainees*

Plaintiffs and defendants seek summary judgment with respect to DOD's withholding of certain photographs and videotapes depicting abuse of detainees

(Items 10,[13] 11,[14] and 69) in Guantánamo Bay and Iraq. Oral argument focused on Item 69,[15] which requested a "report of Detainee mistreatment and a CD with photographs that Joseph Darby, a military policeman assigned to Abu Ghraib, provided to the Army's Criminal Investigations Division." The government initially represented that 144 original photographs and four movies were responsive, [16] and that the images "were taken for personal, rather than official, purposes." Defs.' Reply Br., at 27 n.12.

I first reviewed, *ex parte* and *in camera*, a sample of eight photographs offered by defendant DOD. My Order dated June 1, 2005 reflected my rulings on the responsiveness of each photograph in the sample, as well

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[13] Item 10 requested videotapes, photographs and other records of abuse, including videotapes, photographs and other records of abuse catalogued and stored in Guantánamo Bay facilities

[14] Item 11 requested videotapes, photographs and other records depicting abuse at Iraqi facilities.

[15] The government indicated at oral argument and in its reply papers that DOD had not yet finished processing all of the photographs and other media in its possession that might be responsive to requests 10 and 11, but that to the extent any such items already had been processed and withheld under Exemptions 6 and 7(C), DOD would apply my rulings on the Darby photographs to any such images. I held at oral argument that that procedure was satisfactory. *See* Tr. of May 26, 2005, at 14; *see also id.*, at 28 (suggesting that the parties, at the end of oral argument, create a schedule of items that need to be processed).

[16] These figures reflected the number of images initially determined to be responsive. Other images on the two CDs provided by Darby to the Army's Criminal Investigation Command ("CID"), including duplicates and photographs wholly unrelated to plaintiffs' concerns, are not part of this litigation. *See* Second Decl. of Phillip J. McGuire, Dir. of U.S. Army Crime Records Ctr., CID, dated Mar. 30, 2005, ¶¶ 3, 4 [hereinafter Second McGuire Decl.].

as on the appropriateness and extent of redactions in connection therewith, and I required the government to apply those rulings to all photographs responsive to plaintiffs' requests. The government processed the remaining photographs taken by Darby, and determined that eighty-seven photographs and four movies, redacted as appropriate, were responsive. *See* Third Decl. of Phillip J. McGuire, Dir. of U.S. Army Crime Records Ctr., CID, dated July 20, 2005, ¶ 6. In a session held *in camera* and *ex parte* on August 9, 2005, I viewed all eighty-seven photographs and four videos (collectively, the "Darby photographs"), in both their unredacted and redacted forms.

(a) *Exemptions 6 and 7(C)*

The government, contending that FOIA Exemptions 6, 7(C), and 7(F), 5 U.S.C. § 552(b)(6), (b)(7)(C), (b)(7)(F), apply, opposes the release of the Darby photographs. Exemption 6 exempts:

> personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Exemption 7 exempts:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a

> confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

I first address Exemptions 6 and 7(C); Exemption 7(F) will be addressed separately in a later section.

The government argues that release of the Darby photographs, even if redacted, would constitute an "unwarranted invasion of personal privacy." The government contends that even though the public, in Iraq and elsewhere, has seen photographs from Abu Ghraib when first they appeared in the press, presumably similar to the Darby photographs, the individuals depicted in the photographs would be recognized, even from redacted photographs.

Exemptions 6 and 7(C) contain the identical phrase "unwarranted invasion of personal privacy." Exemption 6, however, has been interpreted to present a higher standard, since the agency must establish that disclosure "would" constitute a "clearly unwarranted" invasion, whereas Exemption 7(C) allows for the withholding of records or information that "could reasonably be ex-

pected" to constitute an "unwarranted" invasion. *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989). Nonetheless, both exemptions require similar considerations by the reviewing district court. *See, e.g.*, *FLRA v. Dep't of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir. 1992) ("And though *Reporters Committee* involved Exemption 7(C) its discussion governs Exemption 6, for the noted differences bear only on the type of information sought and the degree of invasion to a privacy interest that will be tolerated.").

Exemption 6 is to be interpreted broadly as encompassing "information which applies to a particular individual," *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982); in general, this exemption protects "individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Id.* at 599. When such information is sought, courts are to "determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy." *Id.* at 602.

Under Exemption 7, "the government must demonstrate that (1) the document was compiled for law enforcement purposes, and (2) release of the material would result in one of the harms enumerated in the statute," *Ortiz v. Dep't of Health and Human Servs.*, 70 F.3d 729, 732 (2d Cir. 1995)—in the case of 7(C), an "unwarranted invasion of personal privacy." If there is a "personal privacy interest recognized by the statute," courts consider whether the "privacy claim is outweighed by the public interest in disclosure." *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 160 (2004); *see also Dep't of Veterans Affairs*, 958 F.2d at 510 ("[O]nce a more than *de minimis* privacy interest is

implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA.").

(b) *Analysis*

A question may be raised as a threshold matter with respect to Exemption 7(C)'s application to the Darby photographs, whether the photographs were indeed "compiled for law enforcement purposes." The government represents that the Army Criminal Investigation Command ("CID") "opened a report of investigation immediately after receiving these photographs" and that the information therein contained has "been used extensively by CID agents to conduct the investigations into incidents of abuse of detainees at Abu Ghraib." Defs.' Br., at 67-68 (citing Second McGuire Decl., ¶ 6). The government claims, accordingly, that the Darby photographs were "compiled for law enforcement purposes."[17] Plaintiffs appear to agree with this analysis. *See* Pls.' Reply Br., at 16-17 n.4.

Accordingly, even though the Darby photographs were, in the government's own words, "taken for personal, rather than official, purposes," Defs.' Reply Br., at 27 n.12, I will assume for the purposes of Exemption 7 that the Darby photographs were "compiled for law enforcement purposes." This assumption is consistent

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[17] *Amicus curiae* The American Legion, in a brief filed August 11, 2005, at 8-9, argues that the Darby photographs are not properly the subject of plaintiffs' FOIA requests since the photographs were actually under the control of courts martial or of military authority exercised in the field in time of war when plaintiffs made their second FOIA request on May 25, 2004. Since, however, the government is the party in interest and since the government has not raised this objection, I do not consider it.

with case law under FOIA. *See Ortiz*, 70 F.3d at 732-33 (an unsigned, unsolicited letter used by the Department of Health and Human Services' Office of Inspector General to launch a criminal investigation, and kept in its investigative files, was "compiled for law enforcement purposes"); *Dep't of Veterans Affairs*, 958 F.2d at 508 ("To qualify as agency records, the requested information must either be created or obtained by the agency and within its control at the time the FOIA request is made."); *see also Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003) (requiring "(1) a rational nexus between the investigation and one of the agency's law enforcement duties; and (2) a connection between an individual or incident and a possible security risk or violation of federal law"); *Quiñon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (examining if the record was "created or acquired in the course of an investigation").

I am satisfied from my review that publication of redacted photographs will not constitute an "unwarranted invasion of personal privacy," since all identifying characteristics of the persons in the photographs have been redacted, and therefore, as a preliminary matter, I do not find a cognizable "invasion of personal privacy." If, as the government argues, the protagonists might recognize themselves in re-publications of the photographs, or be recognized by members of the public, *see, e.g.*, *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) ("Persons can retain strong privacy interests in government documents containing information about them even where the information may have been public at one-time." (citing *Reporters Committee*, 489 U.S. at 762-63)), even without identifying characteristics being revealed, that possibility is no more than speculative, a

speculation which could apply equally to textual descriptions without pictures.

The Supreme Court addressed similar concerns in *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976), as further explained in *Reporters Committee*, 489 U.S. at 768-69 (1989) (remarking that "much of our discussion" in *Rose*, which dealt with Exemption 6, was applicable to *Reporters Committee*, which dealt with Exemption 7(C)). *Rose* involved a request submitted to the Air Force for case summaries of honor and ethics hearings, with personal references and other identifying information removed from the summaries. The summaries were kept in the United States Air Force Academy's Honor and Ethics Code reading files, and were regularly posted on forty squadron bulletin boards and circulated to various faculty members and administration officials. 425 U.S. at 355. Without examining the summaries to form its own view, the district court held that Exemption 6 was unavailable to the Air Force because "disclosure of the summaries without names or other identifying information would not subject any former cadet to public identification and stigma, and the possibility of identification by another former cadet could not, in the context of the Academy's practice of distribution and official posting of the summaries, constitute an invasion of personal privacy proscribed by § 552(b)(6)," but it granted summary judgment to the Air Force on other grounds. *Id.* at 357.

The Second Circuit reversed, concluding that the district court's decision "'ignores certain practical realities' which militated against the conclusion 'that the Agency's internal dissemination of the summaries lessens the concerned cadets' right to privacy, as embodied

in Exemption Six.'" *Id.* at 358 (quoting 495 F.2d 261, 267-68 (2d Cir. 1974)). The Court of Appeals remanded for further proceedings in which the Air Force was to "'produce the summaries themselves in court' for an *in camera* inspection 'and cooperate with the judge in redacting the records so as to delete personal references and all other identifying information. . . . [The Court of Appeals thought] it highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient for the purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy.'" *Id.* The Supreme Court affirmed, *id.* at 380-82, and, as it later explained in *Reporters Committee*, approved the procedure by which the district court was to remove identifying information and thereby protect the claimed privacy interest:

> [W]e doubly stressed the importance of the privacy interest implicated by disclosure of the case summaries. First: We praised the Academy's tradition of protecting personal privacy through redaction of names from the case summaries. But even with names redacted, subjects of such summaries can often be identified through other, disclosed information. So, second: *Even though the summaries, with only names redacted, had once been public*, we recognized the potential invasion of privacy through later recognition of identifying details, and approved the Court of Appeals' rule permitting the District Court to delete "other identifying information" in order to safeguard this privacy interest.

489 U.S. at 769; *see also id.*, 489 U.S. at 762, 771 (examining the personal privacy interest "in avoiding disclo-

sure of personal matters" and finding substantial privacy interest in criminal rap sheets, even though "events summarized in a rap sheet have been previously disclosed to the public"). The Court has reaffirmed that the "redaction procedure is . . . expressly authorized by FOIA." *Dep't of State v. Ray*, 502 U.S. 164, 174 (1991) (applying Exemption 6).

The procedures I adopted and the rulings I made in the *in camera* sessions embody the principles set out in *Rose* and *Reporters Committee*. I examined each of the Darby photographs, in both its original and redacted forms. Where I determined that the government could better mask identifying features, I ordered it to do so. Furthermore, in the case of a certain small number of photographs, mainly of female detainees, and one of the videos, where the context compelled the conclusion that individual recognition could not be prevented without redaction so extensive as to render the images meaningless, I ordered those images not to be produced. Having viewed the remaining Darby photographs, as thus redacted, I hold that there is no "invasion of personal privacy" under Exemptions 6 and 7(C). *See, e.g., Ray*, 502 U.S. at 175-76 (noting that "disclosure of such personal information [regarding marital and employment status, children, living conditions and attempts to enter the United States] constitutes only a *de minimis* invasion of privacy when the identities of the interviewees are unknown"). If, because someone sees the redacted pictures and remembers from earlier versions leaked to, or otherwise obtained by, the media that his image, or someone else's, may have been redacted from the picture, the intrusion into personal privacy is marginal and

speculative, arising from the event itself and not the redacted image.

Moreover, even were I to find an "invasion of personal privacy," any further intrusion into the personal privacy of the detainees by redacted publications would be, with the exception of the small number described above, minimal and, under a balancing analysis, not "unwarranted" in light of the public interest policy of FOIA. The Supreme Court has set forth its most recent iteration of the balancing analysis under Exemption 7(C) in *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004); *see also Reporters Committee*, 489 U.S. at 772 ("[W]hether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested.") (quotations omitted). As discussed above, since Exemption 7(C) contains the easier burden for the government, I address that Exemption. *See Reporters Committee*, 489 U.S. at 762 n.12 ("Because Exemption 7(C) covers this case, there is no occasion to address the application of Exemption 6.").

In *Favish*, the Supreme Court held that the public interest in photographs of the death scene of Vincent Foster, Jr., deputy counsel to President Clinton, was insufficiently supported in light of the substantial interest in privacy of Vincent Foster's family. The Court arrived at this holding after asking whether the information requested would advance a significant public interest:

> Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

Favish at 172.

With the exception of the small number of Darby photographs that I ordered to be withheld, where the risk of exposure is too great and the informational value is minimal, the balancing analysis weighs in favor of disclosure in the present case. There is a substantial public interest in these pictures, evidenced by the active public debate engendered by the versions previously leaked to the press, or otherwise obtained by the media. *See* discussion in section (c) of this Opinion, *infra*. Moreover, the government concedes that wrongful conduct has occurred. Defs.' Br., at 70-72. Plaintiffs assert that they seek release of the Darby photographs to inform and educate the public, and to spark debate about the causes and forces that led to the breakdown of command discipline at Abu Ghraib prison and, possibly, by extension, to other prisons in Iraq, Afghanistan, Guantánamo, and perhaps elsewhere. These are the very purposes that FOIA is intended to advance. The photographs are sought to "shed[] light on an agency's performance of its statutory duties" and to "contribut[e] significantly to public understanding of the operations or activities of the government." Pls.' Reply Br., at 24 (quoting *Report-*

ers Committee, 489 U.S. at 773 & 775). As I remarked at oral argument:

> photographs present a different level of detail and a different medium, and are the best evidence that the public could have as to what occurred at a particular time, better than testimony, which can be self-serving, better than summaries, which can be misleading, and better even than a full description no matter how complete that description might be.

Tr. of May 26, 2005, at 14. There is no alternative, less intrusive means by which the information may be elicited. *See, e.g., Dep't of Def. Dep't of Military Affairs v. FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992). The redacted originals, rather than piece-meal leaks and possibly partial depictions of several of the pictures, are more probative of what Darby and his fellow military personnel actually did. Under the requirements of *Favish*, the claimed public interest in production of the redacted photographs is substantiated and far outweighs any speculative invasion of personal privacy.

The government also opposes production because, it argues, doing so would conflict with the United States' obligations under the Geneva Conventions. The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the "Third Geneva Convention") provides that a detaining power must protect a prisoner of war "particularly against acts of violence or intimidation and against insults and public curiosity." Art. 13. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (the "Fourth Geneva Convention") provides that civilians under detention are entitled to "respect for

their persons, their honor. . . . shall at all times be treated humanely, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." Art. 27.

Defendants present evidence that the United States historically has interpreted these two conventions to forbid the taking and publishing of photographs of detainees, *see* Decl. of Edward R. Cummings, Ass't Legal Adviser for Arms Control and Verification, Dep't of State, dated Mar. 24, 2005, ¶¶ 12-17 [hereinafter Cummings Decl.], and argue that publication of the photographs in this case would conflict with the United States' treaty obligations thereunder. *See id.* ¶ 19; Decl. of Geoffrey S. Corn, Special Ass't to Judge Advocate Gen. for Law of War Matters, Dep't of Army, dated Mar. 25, 2005, ¶¶ 10-11 [hereinafter Corn Decl.]. The government's treaty interpretations are entitled to respect. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given to them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

The government argues that "[e]ven if the identities of the subjects of the photographs are never established," those subjects could suffer humiliation and indignity against which the Geneva Conventions were intended to protect. Corn Decl. ¶ 11. It also states, without supporting documentation, that the ICRC has taken the position that the Third Geneva Convention forbids publishing images that "show prisoners of war in degrading or humiliating positions or allow the identification of individual POWs." Cummings Decl. ¶ 17. The redactions and withholding that I ordered should protect

civilians and detainees against "insults and public curiosity" and preserve their "honor." Production of these images coheres with the central purpose of FOIA, to "promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed," *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005). Accordingly, I hold that the government may not withhold the Darby photographs, redacted to eliminate all identifying characteristics of the persons shown in the photographs, under Exemptions 6 and 7(C).

(c) *The Government's Supplemental Argument: Exemption 7(F)*

On July 28, 2005, more than two months after the motion was initially argued, the government added another ground of claimed exemption, Exemption 7(F), to supplement its opposition to production of the Darby photographs. Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), exempts

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (F) could reasonably be expected to endanger the life or physical safety of any individual.

Plaintiffs and *amici curiae*, The Reporters Committee for Freedom of the Press and other prominent news organizations, object to my consideration of the government's eleventh-hour argument in reliance on Exemption 7(F). *See* Proposed Br. *Amici Curiae*, filed Aug. 3, 2005. *Amici* argue that the exemption now pressed by the government could have been presented much earlier, certainly by the date of oral argument in May, and that

its invocation at this late date delays the ultimate resolution of the issues. *Amici* contend that the government's supplemental argument is not made in "good faith" and should not be considered by the court. *See Piper v. DOJ*, 374 F. Supp. 2d 73, 78-79 (D.D.C. 2005). While I appreciate the concern of *amici*, I rule that the government's opposition, although filed late, should be considered. *See, e.g., Nat'l Council of La Raza v. DOJ*, No. 03 Civ. 2559, 2004 WL 2314455, at * 1 (S.D.N.Y. Oct. 14, 2004); *see also August v. FBI*, 328 F.3d 697 (D.C. Cir. 2003). The issue of the physical safety of our troops in Iraq and Afghanistan, and of the citizens of those countries, has been of paramount concern throughout this case, and it is sensible to address the issue squarely under the framework advanced by the government. The parties agreed to an expedited briefing schedule in order to minimize delays.[18]

The government contends that publication of the Darby photographs pursuant to court order is likely to incite violence against our troops and Iraqi and Afghan personnel and civilians, and that redactions will not avert the danger. The government argues that the ter-

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[18] As requested by the government, certain portions of the government's submission—its Supplemental Memorandum of Law and supplemental declarations—were filed under seal in accordance with my Sealing Order of July 28, 2005 to withhold (1) specific descriptions of the images whose release is in issue, and (2) sensitive information relating to national security and the United States' foreign relations. Plaintiffs objected to the sealing of the submission except with respect to the first item, the specific descriptions of the Darby photographs. However, I was able to establish consensus in enlarging the public record so that all the government's arguments could be made publicly. Oral argument on the expanded public record was held on August 15, 2005. This Opinion discloses no fact or argument that is not part of the public record.

rorists will use the re-publication of the photographs as a pretext for further acts of terrorism. *See* Second Amended Decl. of Richard B. Myers, Chairman, Joint Chiefs of Staff, dated Aug. 25, 2005, ¶¶ 8, 31 (stating that the "insurgents will use any means necessary to incite violence and, specifically, will focus on perceived U.S. or Coalition mistreatment of Iraqi civilians and detainees as a propaganda and recruiting tool to aid their cause," and that "redaction of the photographs and videos will not alleviate or lessen this risk"). Plaintiffs, on the other hand, provide the declaration of a scholar on the Middle East who states that, in his opinion, "there is nothing peculiar about Muslim culture in Iraq or elsewhere that would make people react to these pictures in a way different from other people's reactions elsewhere in the world." Decl. of Khaled Fahmy, Prof., New York Univ., dated Aug. 4, 2005, ¶ 8. In addition, Professor Fahmy suggests that there is a large group of Iraqis, and of Muslims generally, who respond favorably when we show the openness of our society and the accountability of our government officials, and that we would suppress those values and that favorable response by preventing publication of the Darby photographs. *See id.* ¶ 11.

Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command. Indeed, the freedoms that we champion are as important to our success in Iraq and Afghanistan as the guns and missiles with which our troops are armed. As President Bush stated in his 2005 State of the Union address,

> [t]he attack on freedom in our world has reaffirmed our confidence in freedom's power to change the world. We are all part of a great venture: to extend

> the promise of freedom in our country, to renew the values that sustain our liberty, and to spread the peace that freedom brings.

Available at http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html. Justice Anthony Kennedy, in a recent interview, expanded on the same point:

> Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is that not because there's some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means? I think that's what we're trying to tell the rest of the world, anyway.

Jeffrey Toobin, *Swing Shift*, The New Yorker, Sept. 12, 2005, at 50.

The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and tactics. They have driven exploding trucks into groups of children at play and men seeking work; they have attacked doctors, lawyers, teachers, judges and legislators as easily as soldiers. Their pretexts for carrying out violence are patent hypocrisies, clearly recognized as such except by those who would blur the clarity of their own vision. With great respect to the concerns expressed by General Myers, my task is not to defer to our worst fears, but to interpret and apply the law, in this case, the Freedom of Information Act, which advances values important to our society, transparency and accountability in government.

Exemption 7(F) was enacted to protect the safety of individuals involved in law enforcement investigations. Originally, the exemption protected only "law enforcement personnel." *See* Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974) (exempting "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . endanger the life or physical safety of law enforcement personnel"). In 1986, Exemption 7(F) was amended to protect all those put at risk through their participation in law enforcement proceedings, whether as sources of information or as witnesses. *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207; *see also Garcia v. DOJ, Office of Info. and Privacy*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) (withholding names and identifying information of government agents and private citizen informers where subject of investigation had history of retaliation and violence); *Blanton v. DOJ*, 182 F. Supp. 2d 81, 87 (D.D.C. 2002) (same, in connection with racial hate crime, the bombing of a church, and charges of first degree murder), *aff'd*, 64 Fed. Appx. 787 (2003); *Shores v. FBI*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (same, identities of cooperating witnesses where plaintiff had already attempted retaliation).

Exemption 7(F) has thus been construed to protect individuals involved in law enforcement investigations and trials, as officials and as private citizens providing information and giving testimony. At least twice, however, the statute has been applied to give protection to broader groups of individuals who were not involved in particular criminal investigations and prosecutions. *See Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321 (D. Utah 2003) (withholding inun-

dation maps for fear terrorists could use the information to place at risk the life or physical safety of downstream residents who would be flooded by a breach of the Hoover Dam or Glen Canyon Dam); *Larouche v. Webster*, 75 Civ. 6010, 1984 WL 1061, at *8 (S.D.N.Y. Oct. 23, 1984) (withholding FBI laboratory report describing manufacture of home-made machine gun to protect law enforcement personnel from encounters with criminals armed with home-made weapons). Moreover, at least one court has ruled that "[u]nlike Exemption 7(C), which involves a balancing of societal and individual privacy interests, 7(F) is an absolute ban against certain information and, arguably, an even broader protection than 7(C)." *Raulerson v. Ashcroft*, 271 F. Supp. 2d 17, 29 (D.D.C. 2002). Accordingly, the government argues that once it has established that the Darby photographs are "records or information compiled for law enforcement purposes," any non-trivial concern that it advances about the life or physical safety of any individual entitles it to withhold the photographs under Exemption 7(F).

Plaintiffs, on the other hand, argue that *Living Rivers* and *Larouche* are aberrational, *see Maydak v. DOJ*, 362 F. Supp. 2d 316, 321 n.4 (D.D.C. 2005) ("In general, this exemption [7(F)] has been interpreted to apply to names and identifying information of law enforcement officers, witnesses, confidential informants and other third persons who may be unknown to the requester."). Plaintiffs also argue that since Congress lodged its concern about endangerment to life and safety under Exemption 7, and did not address the concern in an independent and generally applicable exemption, Exemption 7(F) should be applied in its narrow context, to the concern expressed by Congress, and not as a catch-all exemption. *See* Tr. of Aug. 30, 2005, at 22-23. In essence,

plaintiffs contend that Exemption 7(F) should not be a substitute for the government's power to classify information requiring protection.

Larouche was decided before the statutory amendment and without much analysis of Exemption 7(F). Its focus was on law enforcement—on the dangers of homemade machine guns to law enforcement personnel—a nexus to Exemption 7(F)'s central purpose. With regard to *Living Rivers*, the inundation maps were compiled by the Bureau of Reclamation to "maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands" by protecting and alerting threatened communities, 272 F. Supp. 2d at 1319 (citing 43 U.S.C. § 373b(a)), again a nexus to law enforcement in that context. However, there is no such nexus with respect to the Darby photographs.[19] The Darby photographs are being withheld, not to protect anyone involved in the courts martial investigations and prosecutions, but for another purpose. The persons who took the photographs, or handed them over to commanding officers, do not ask for protection. Law enforcement officials charged with investigating the circumstances that surrounded the taking of the Darby photographs do not ask for protection, and there is no allegation that

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[19] In its brief, at 4, *amicus* The American Legion suggests that because the Darby photographs "apparently concern, at least in part, activities inside a reserve brigade of military police," the photos should be withheld because "[t]heir lives would be endangered by disclosure of the Darby photos, and they deserve no less protection than civilian police receive under the FOIA." The government makes no such argument, and indeed, it is clear from General Myers' declaration that he is concerned broadly about potential danger to all members of the United States' armed forces and public, as well as to Iraqi and Afghan personnel and civilians.

release of the photographs will endanger their lives. And since the identifying characteristics of the detainees are to be redacted, they too are not endangered. The sole justification for suppressing the photographs is the DOD's concern about speech—generally, how some might exploit the Darby photographs, in propaganda and in terrorist activities, by arguing, through false extension, that the pictures represent the attitudes of all American soldiers, or indeed of all Americans, toward the Iraqi people.

It is not necessary for me to rule if *Larouche* and *Living Rivers* are, or are not, appropriate extensions of Exemption 7(F). I reject, however, the government's argument that reasoning must stop once a threat to life or safety is discerned. Balancing and evaluation are essential aspects of the judicial function, no less in considering the exemptions of FOIA than in other areas of the law. It is clear to me that the core values that Exemption 7(F) was designed to protect are not implicated by the release of the Darby photographs, but that the core values of FOIA are very much implicated.

The interest at stake arises from pictures of flagrantly improper conduct by American soldiers—forcing prisoners under their charge to pose in a manner that compromised their humanity and dignity. As I stated at the time of the original argument, and as I reiterated previously in this decision, the pictures are the best evidence of what happened, better than words, which might fail to describe, or summaries, which might err in their attempt to generalize and abbreviate. Publication of the photographs is central to the purposes of FOIA because they initiate debate, not only about the improper and unlawful conduct of American soldiers, "rogue" soldiers,

as they have been characterized, but also about other important questions as well—for example, the command structure that failed to exercise discipline over the troops, and the persons in that command structure whose failures in exercising supervision may make them culpable along with the soldiers who were court-martialed for perpetrating the wrongs; the poor training that did not create patterns of proper behavior and that failed to teach or distinguish between conduct that was proper and improper; the regulations and orders that governed the conduct of military forces engaged in guarding prisoners; the treatment of prisoners in other areas and places of detention; and other related questions.

Suppression of information is the surest way to cause its significance to grow and persist. Clarity and openness are the best antidotes, either to dispel criticism if not merited or, if merited, to correct such errors as may be found. The fight to extend freedom has never been easy, and we are once again challenged, in Iraq and Afghanistan, by terrorists who engage in violence to intimidate our will and to force us to retreat. Our struggle to prevail must be without sacrificing the transparency and accountability of government and military officials. These are the values FOIA was intended to advance, and they are at the very heart of the values for which we fight in Afghanistan and Iraq. There is a risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts. But the education and debate that such publicity will foster will strengthen our purpose and, by enabling such deficiencies as may be perceived to be debated and corrected, show our strength as a vibrant and functioning democracy to be emulated.

In its most recent discussion of FOIA, the Supreme Court commented that "FOIA is often explained as a means for citizens to know what 'their Government is up to.' The sentiment is far from a convenient formalism. It defines a structural necessity in a real democracy." *Favish*, 541 U.S. at 171-72. As President Bush said, we fight to spread freedom so the freedoms of Americans will be made more secure. It is in compliance with these principles, enunciated by both the President and the highest court in the land, that I order the government to produce the Darby photographs that I have determined are responsive and appropriately redacted.

Conclusion.

For the reasons stated, the motions for partial summary judgment, by plaintiffs and by defendants, are granted and denied as discussed herein. This Opinion and Order is stayed twenty days in order to allow for appeal by either side, should it wish to do so.

SO ORDERED.

Dated: New York, New York
September 29, 2005

/s/ ALVIN K. HELLERSTEIN
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number: 06-3140-cv

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, VETERANS FOR PEACE, PLAINTIFF-APPELLEES

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF STATE, CENTRAL INTELLIGENCE AGENCY, DEFENDANT-APPELLANTS

[Filed: Mar. 11, 2009]

ORDER

Defendant-Appellants Department of Defense having filed a petition for panel rehearing, or, in the alternative,

for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ FRANK PEREZ
FRANK PEREZ, Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 4151 (AKH)

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE AND VETERANS FOR PEACE, PLAINTIFFS

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION; DEPARTMENT OF STATE; AND CENTRAL INTELLIGENCE AGENCY, DEFENDANTS

[Filed: Aug. 29, 2005]

SECOND AMENDED DECLARATION OF RICHARD B. MYERS

Richard B. Myers, pursuant to 28 U.S.C. sec. 1746, declares as follows:

1. I am the Chairman of the Joint Chiefs of Staff. I serve as the senior military advisor to the President of the United States, the Secretary of Defense, and the National Security Council. I am the highest ranking uniformed officer in the United States Armed Forces. In performing my duties, I routinely confer with and obtain advice from combatant commanders regarding the operational requirements of their commands; I evaluate and synthesize this information; I advise and make recommendations to the Secretary of Defense with respect to these requirements; and, as appropriate, I communicate the combatant commands' requirements to other elements of the Department of Defense.

2. Through the exercise of my official duties and as a result of my personal knowledge, I am familiar with this civil action and with Plaintiffs' requests for information under the Freedom of Information Act. Further, I have reviewed the 87 photographic and video images that are identified in paragraph 6 of the Third Declaration of Philip J. McGuire (collectively referred to as the "responsive Darby Photos"). For the reasons set forth in this declaration, I have concluded that the official release of the images further identified below, even if redacted to obscure identifying information and, where applicable, the genitalia of those depicted, could reasonably be expected to:

a. Endanger the lives and physical safety of the Soldiers, Sailors, Airmen, and Aarines [*sic*] in the United States Armed Forces presently serving in Iraq and Afghanistan, as well as other U.S. officials, Coalition Forces allied with the United States, and contractors serving with these forces;

b. Endanger the lives and physical safety of Iraqi civilians at large, and police and military personnel of the democratic Iraqi Transitional Government working in coordination with the United States and Coalition Forces in support of Operation IRAQI FREEDOM;

c. Endanger the lives and physical safety of Afghan civilians at large, and police and military personnel of the Government of Afghanistan working in coordination with the United States and Coalition Forces operating in support of Operation ENDURING FREEDOM, NATO-led operations, and contractors serving with these forces;

d. Aid the recruitment efforts and other activities of insurgent elements, weaken the new democratic governments of Iraq and Afghanistan, and add radical pressures on several of our regional allies and friends; and

e. Increase the likelihood of violence against United States interests, personnel, and citizens worldwide.

THE BASES FOR MY CONCLUSIONS

3. My conclusions are based upon my years of service and experience in the United States military; the assessments and evaluations of the U.S. Central Commander, General John P. Abizaid, and his immediate subordinate commander of the Multi-National Forces-Iraq, General George Casey; and intelligence reports and the assessments of Department of Defense subject-matter experts on the Middle-Eastern region, Arab culture, and the tenets of the Islamic religion. In formulating the advice I provide to the President, the Secretary

of Defense, and the National Security Council in the ordinary course of my duties, I routinely rely on the views of our combat commanders, intelligence synthesis and reports, and the assessments of subject matter experts. In formulating my conclusions concerning the Darby Photos, I have used the same approach, types of resources, information, and experts. In particular:

a. I have served in the United States Armed Forces for 40 years at various levels of command and staff. I have served as the Chairman of the Joint Chiefs of Staff since October 1, 2001. I served as the Vice Chairman from March 2000 through September 2001. I have been the President's principal military advisor since shortly after the attacks on the World Trade Center and the Pentagon, including throughout the inception, planning, and execution of Operation ENDURING FREEDOM and Operation IRAQI FREEDOM. I have intimate, extensive knowledge of our military forces and their capabilities, as well as of the conventional and unconventional forces and capabilities of the enemies arrayed against us. I daily receive and review intelligence analyses of current regional conditions, acute situations, and trends in operations and conditions relating to Operation ENDURING FREEDOM and Operation IRAQI FREEDOM from the Joint Staff, the Department of Defense, as well as from other intelligence sources within the Executive Branch. I routinely travel to the countries within the U.S. Central Command critical to these ongoing missions. I meet, receive information from, and provide information to, the senior political, civilian, and military leaders of Iraq, Afghanistan, and our other regional allies. Our senior field commanders brief me, and I routinely inspect

the environment, conditions, and equipment of our Soldiers, Sailors, Airmen, and Marines in the combat theaters of operation.

c. With respect to this matter, I solicited the assessments and recommendations of the U.S. Central Commander, General John P. Abizaid, and the Multi-National Forces-Iraq Commander, General George Casey, concerning their views of the military implications of release of the responsive Darby Photos. Both of them, by dint of their positions and responsibilities, have highly informed opinions that I have considered in this matter. General Abizaid is constantly engaged with senior political and civic leaders in the region. Moreover, General Abizaid has specialized knowledge of the Middle East: he is fluent in the Arabic language; he holds a Masters Degree in Middle Eastern Studies from Harvard University; he was a Hoover Institution, Stanford University Fellow studying Middle Eastern affairs; and he was an Olmsted Scholar at the University of Jordan at Amman. Before his service as the Commander, U.S. Central Command, General Abizaid served under General Tommy Franks as his Deputy Commander (Forward) during Operation IRAQI FREEDOM. After the first Gulf War, he served in the Kurdish region of northern Iraq in Operation NORTHERN WATCH. During the course of his military career, he has served in other positions in the Middle East as well as in positions involving ethnic Muslim minorities in the Balkans. His staff assignments have included tours with the United Nations as operations officer for the Observer Group

Lebanon, and he has also served on the Joint Staff as the Director of Strategic Plans and Policy.

d. As the Commander of Multi-National Forces-Iraq, General George Casey is constantly engaged with the senior political and civic leaders in Iraq. He travels extensively throughout the country, and regularly confers with commanders and service personnel at all levels of command and operations. In addition to his numerous Army command assignments, General Casey most recently served as the Vice Chief of Staff of the Army; immediately before that he served under me, first as the Director of Strategic Plans and Policy, and then as the Director of the Joint Staff. His graduate and post-graduate degrees are in International Relations. General Casey has also served as a Senior Fellow on The Atlantic Council.

e. Both General Abizaid and General Casey agree with and support my conclusions.

f. As I indicated above, I have also considered and relied upon the analysis and assessments of DOD resident subject-matter experts on the Middle-Eastern region, the Arab culture, and the tenets of the Islamic religion.

THE STATUS OF OPERATION ENDURING FREEDOM AND OPERATION IRAQI FREEDOM

4. Following the attacks on the United States of September 11, 2001, the United States military, with the support of a worldwide coalition, launched Operation ENDURING FREEDOM to drive the oppressive Taliban regime—which provided comfort and support to al-

Qaeda terrorists—from Afghanistan. As a result of that successful effort, the Taliban was removed from power, and on October 9, 2004, the Afghan people for the first time ever selected their head of state, the president of Afghanistan, by democratic vote. Similarly, Operation IRAQI FREEDOM was launched, again with the support of a worldwide coalition, to remove the dictatorial and murderous regime of Saddam Hussein from power, and succeeded in toppling that dictator and bringing freedom to Iraq. Following a brief period when Iraq was led by a Coalition Provisional Authority, sovereignty of Iraq was transferred to an interim government, and democratically elected representatives of the Iraqi people are in the process of completing work on a national constitution. There is, however, more work to do. Insurgent elements in both Afghanistan and Iraq continue to attack the process of democratic transition in those countries by mounting violent and deadly assaults against the multinational forces that remain posted in the region in order to protect and defend those countries as they take their steps toward freedom. As part of the multinational commitment to strengthening and defending these emerging democracies, more than 19,000 U.S. troops remain on the ground in Afghanistan and over 140,000 U.S. troops are part of the ongoing mission in Iraq.

5. The situation on the ground in Iraq is dynamic and dangerous, in Baghdad and several other parts of the country. It changes from day to day, and it varies from region to region. With that in mind (and the caveat that numbers alone do not tell the complete story). [*sic*] I offer the following observations to provide the Court with some in-country context for the conclusion that official disclosure of the responsive Darby Photos de-

scribed further below reasonably can be expected to endanger, in wartime, the lives and physical safety of U.S. military and other personnel, as well as the general public in Iraq and Afghanistan and elsewhere.

6. As General Abizaid testified to the Senate Armed Services Committee on June 23, 2005, the overall strength of the insurgency is about the same as it was six months ago, although he noted his belief that "there are more foreign fighters coming into Iraq than there were six months ago." Current estimates of the number of insurgents are in the range of 16,000 with perhaps 1,000 of that number being foreign fighters.

7. The number of insurgent attacks per day is approximately 70. As I have publicly stated, our assessments indicate that the lethality of the attacks is on average increasing.

8. Among the goals of the insurgency are to use violence against innocent civilians to undercut the mission of the U.S. and Coalition forces, as well as the Iraqi Transitional Government, and to stop the transition to democracy in that country. The insurgents will use any means necessary to incite violence and, specifically, will focus on perceived U.S. or Coalition mistreatment of Iraqi civilians and detainees as a propaganda and recruiting tool to aid their cause.

a. Thus, for example, we have documented situations in which insurgents have falsely claimed that U.S. actions in Iraq, rather than their own terrorist attacks, have caused death and suffering. One organization, the Global Islamic Media Front, specializes in producing flash videos which typically feature dozens of images of women and children whose suffering

is attributed to U.S. actions in Iraq as opposed to the acts of sabotage and violence perpetrated by the insurgents.

b. Similarly, the insurgents rely on doctored photos and images to support their calls to violence. Last year DOD experts noted doctored images and videos that purported to document the rape of Iraqi women by U.S. soldiers—but which actually originated on a Hungarian pornography site—and that were distributed and presented on pro-Islamic and Arabic news web sites as actual examples of U.S. "barbarism." In conducting Internet discussions regarding these images/videos on her websites, *Iraq Patrol* and *Iraq Tunnel*, Iraqi novelist and Middle East expert, Buthaina Al-Nasiri, noted, "You cannot imagine the kind of angry messages I receive every day from young Arab men vowing to avenge the Iraqi girls. . . ."

c. Specific references to the so-called rape photos surfaced in subsequent Muslim sermons throughout the Middle East along with calls for retaliatory violence. For example, in response to similarly doctored rape images, purporting to depict the alleged rape of three Iraqi women at British-run prisons in Iraq, Sheik Abdul-Sattar al-Bahadli of Basra called for Jihad and offered $350 for anyone capturing a British soldier, $150 for killing one, and stated that "Any Iraqi who takes a female soldier (foreign) can keep her as a slave or gift to himself."

d. We have noted other instances of insurgent attacks after the disclosure of images depicting alleged abuse of detainees. On January 21, 2005, three days

after 22 photos of detainees in British custody were made public, an Iraqi insurgent suicide car bomber drove his vehicle toward the gate of a British base in southern Iraq. His vehicle detonated just as it was intercepted before reaching the gate, but the explosion still resulted in numerous, very serious British injuries. Al Qaeda leader Abu Musab al-Zarqawi described the attack as a "response to the harm inflicted by British occupation forces on our brothers in prison."

9. There have been near-term increases in the assassination of Iraqi government officials (52 in the three-month period ending June 27, 2005), as well as a recent uptick in insurgent attacks on senior diplomatic officials from regional neighbors of Iraq: the Egyptian envoy was abducted on July 4, 2005, and murdered; and, in separate incidents, the Bahrainian and Pakistani ambassadors' vehicle convoys were attacked on July 6, 2005 (the Bahrainian ambassador was wounded in the hand by automatic weapons fire; the Pakistani ambassador was uninjured, but has been ordered by his government out of the country as a temporary security measure).

10. While I believe that the overall trends in Iraq indicate improvement, attacks on the economic infrastructure in Iraq remain a constant problem, are significantly difficult to defend against (because of generally decrepit conditions and the nature of defending large facilities in diverse geographical locations), and present acute hardships, particularly to Baghdad residents during the summer season. Water, electrical, and oil infrastructure are the main insurgent targets.

11. The situation on the ground in Afghanistan also remains volatile, particularly as the Taliban-led insur-

gency attempts to derail the political process by increasing attacks in the run-up to the September 18th National Assembly elections. Violence has steadily risen since May, and levels of Taliban, al-Qaida, and Hezb-e Islami Gulbuddin (HIG) attacks against our military forces in June were the second highest in a single month since the Taliban fell in late 2001.

12. In addition to increasing the quantity of attacks, insurgents are shifting their tactics. Bomb attacks in June were the highest on record, including a rise in suicide bombings: there have been eight suicide attacks thus far this year compared to four for all of 2004. The Taliban is now targeting candidates and electoral workers for the National Assembly elections (there have been at least 16 attacks recently), as well as pro-central government clerics (four have been assassinated since June 1, 2005). The incidents of the Taliban intimidating reform-minded Muslim clerics have also increased. There are, on average, approximately 40-45 insurgent-initiated attacks per week.

13. Insurgents in Afghanistan have a relatively sophisticated and aggressive information operations campaign. Taliban spokesmen respond quickly to claim credit when insurgents conduct successful attacks against Coalition or Afghan forces, and even claim tactical successes for incidents not related to the insurgency. The Taliban are also quick to spread disinformation about culturally sensitive issues such as the Coalition treatment of Afghan women as a means of turning public opinion against the United States and other Western countries.

14. While the Taliban is struggling to maintain popular support among Afghans, there are indications that

their aggressive information operations campaign, combined with growing discontent with the Afghan government, could be fueling localized dissatisfaction with the continuing presence of Coalition and NATO forces. For example, the Taliban were quick to capitalize on the May 11-14 protests against the alleged desecration of the Koran at Guantanamo Bay (discussed in more detail below) and described the protests as "a firm reaction of the people of Afghanistan against the presence of U.S. forces . . . and inhumane treatment with prisoners at detention centers . . . showing disrespect to the Muslims' faith" in a 13 May press statement. Protests, some of which turned violent and deadly, occurred in 14 of the 34 provinces.

RIOTING AND VIOLENCE FOLLOWING THE *NEWSWEEK* REPORT OF ALLEGED U.S. DESECRATION OF THE KORAN AT GUANTANAMO BAY

15. On April 30, 2005, *Newsweek* reported that an unnamed U.S. official had seen a government report documenting desecration of the Koran at the U.S. facility at Guantanamo Bay, Cuba. On May 16, 2005, *Newsweek* retracted the statement in an article that the abuse had been uncovered in an "internal military investigation" after its source was unable to confirm where he had seen the purported information. *Newsweek* also offered further qualifications on the story in its May 23, 2005, issue.

16. The Koran's alleged desecration, as reported by *Newsweek*, was perceived as such an affront to the Islamic faith that massive anti-U.S. demonstrations quickly erupted in the Palestinian territories, Egypt, Sudan,

Bangladesh, Pakistan, and Indonesia. Our intelligence assessments indicate that the volatile public sentiments in these Muslim countries were exploited by organized, anti-American extremists who succeeded in fomenting violent and deadly demonstrations.

17. In Afghanistan, in particular, where over 19,000 U.S. troops are currently serving in Operation ENDURING FREEDOM, violence erupted as a result of the *Newsweek* report. Demonstrations began in the eastern provinces and spread to the capital, Kabul. The United Nations, as a precautionary measure, withdrew its entire foreign staff from Jalalabad, where two of its guesthouses were attacked, government buildings and shops were targeted, and the offices of two international aid groups were destroyed. At least 17 deaths in Afghanistan were attributed to the reaction to the Koran story.

18. Despite Newsweek's published retraction, many Muslims still believe that U.S. personnel continue to desecrate the Koran in an effort to humiliate Muslims. For example, one Sunni website asserts that desecration of the Koran is a daily occurrence in Iraq under U.S. occupation and posted numerous photos of another such alleged incident. According to the website: "To humiliate the Koran in Iraq is a well-known tactic of the occupation and allied forces. The Koran has been desecrated by the Crusaders and the Jews. The latest incident of this happened when American soldiers raided the Al-Quds Mosque in . . . Al-Ramadi . . . The soldiers searched the entire mosque, tore the Koran, and beat the worshippers during the morning prayers."

19. The riots and violence that followed the *Newsweek* story had a significant impact on U.S. Central Command operations and intelligence assessments of

conditions throughout both combat theaters, as well as regionally and beyond. Our intelligence and operations analysts evaluated the Koran incident in order to provide assessments and "lessons-learned" both to the combatant commanders and the Department of Defense. While I received and reviewed these assessments, my attention was first brought fully to bear in the context of this case on June 17, 2005. On that day I was informed that disclosure of the Darby Photos could occur as early as June 30, 2005. In light of the nature of the photos, and the riots and violence that occurred after the *Newsweek* article, I contacted General Abizaid (who in turn contacted General Casey), apprised him of the situation, and asked for General Abizaid's military assessment of the implications of the release of the Darby Photos. General Abizaid and General Casey provided their assessments to me on June 20, 2005. They agreed with my determination that disclosure of the Darby Photos created the significant risks discussed in this declaration.

THE REDACTED RESPONSIVE DARBY PHOTOS GRAPHICALLY DEPICT DETAINEE ABUSE AND MISTREATMENT

20. I have personally reviewed the 87 responsive photographic and 4 video images that are identified in paragraph 6 of the Third Declaration of Philip J. McGuire.

21. [SEALED]

22. [SEALED]

23. [SEALED]

CONCLUSIONS AFTER REVIEWING THE RESPONSIVE DARBY PHOTOS

24. While I have said this previously in countless forums, I condemn in the strongest terms the misconduct and abuse depicted in these images. It was illegal, immoral, and contrary to American values and character. The Department of Defense has spared no effort and will continue to press the investigation of, and full accountability for, these criminal acts. Based on my review, I believe that official release of the responsive Darby Photos described in paragraphs 21-23 will pose a clear and grave risk of inciting violence and riots against American troops and coalition forces. I also believe that release of the responsive Darby Photos will expose innocent Iraqi, Afghan, and American civilians to harm as a result of the insurgency's reaction, which will likely involve violence and rioting. It is probable that Al-Qaeda and other groups will seize upon these images and videos as grist for their propaganda mill, which will result in, besides violent attacks, increased terrorist recruitment, continued financial support, and exacerbation of tensions between the Iraqi and Afghan populaces and U.S. and Coalition Forces.

25. The recent vitriolic and violent reaction to *Newsweek's* Koran report described above—even following its retraction—made it clear that U.S. and allied troops and personnel and civilians in the Middle East will be subject to a likely, serious, and grave risk if the responsive Darby Photos described in paragraphs 21-23 are publicly released. Release of these images will be portrayed as part and parcel of the alleged, continuing effort of the United States to humiliate Muslims and, given the pat-